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No. 84-1641

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1984

INDEPENDENT GROUP ASSOCIATION,
Petitioner

v.

BLACK GRIEVANCE COMMITTEE,
Respondent

—and—

NATIONAL LABOR RELATIONS BOARD,
Respondent

—and—

PHILADELPHIA ELECTRIC COMPANY,
Respondent

PETITION OF THE INDEPENDENT GROUP ASSOCIATION FOR WRIT OF CERTIORARI

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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Questions Presented

Two issues are presented for review in this case:

1. Whether the National Labor Relations Act obligates an employer to deal equally with and treat identically two or more non-majority labor organizations, where none is seeking exclusive representative status under §9(a) of the Act (29 U.S.C. §159(a)), thereby compelling an employer to choose between dealing with any and every minority labor organization and refusing to deal at all.

2. Whether the Court of Appeals exceeded its permissible scope of review when it substituted its interpretation of the National Labor Relations Act for that of the National Labor Relations Board after (a) the Board concluded that the Act had not been violated, and (b) the Court of Appeals concluded that the factual findings of the Board were supported by substantial evidence.

Parties to Proceeding

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PETITION FOR WRIT OF CERTIORARI

Petitioner, the Independent Group Association (the "IGA"), respectfully prays that a Writ of Certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Third Circuit, which judgment was entered on January 18, 1985, and which judgment set aside the order of the National Labor Relations Board (the "NLRB" or the "Board"), dated February 10, 1984, adopting the recommended order of the Administrative Law Judge, dated November 5, 1982, and dismissing the complaint which had alleged, *inter alia*, violations of §§8(a)(1) and 7 of the National Labor Relations Act.

OPINIONS BELOW

The Opinion of the Court of Appeals for the Third Circuit is reported at 749 F.2d 1072 (3d Cir. 1984) (A-1).* The order of the National Labor Relations Board adopting the findings and recommended order of the Administrative Law Judge and dismissing the complaint is reported at 268 NLRB 830 (1984) (A-16). The decision and recommended order of the Administrative Law Judge is appended to the order of the Board. (A-18).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered on January 18, 1985 (A-14). This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. §1254(1). The Black Grievance Committee was an "aggrieved" person within the meaning of §10(f) of the National Labor Relations Act (the "Act") (29 U.S.C. §160(f)) at the conclusion of the proceedings before the National Labor Relations Board. Therefore, the United States Court of Appeals for the Third Circuit had jurisdiction over this matter pursuant to 29 U.S.C. §160(f).

STATUTORY PROVISIONS INVOLVED

This case involves interpretation of Sections 7 and 8(a)(1) of the National Labor Relations Act (29 U.S.C. §§157 and 158(a)(1)). These statutory provisions are reproduced herein at A-51.

STATEMENT OF THE CASE

Petitioner, the Independent Group Association is a labor organization within the meaning of §2(5) of the National Labor Relations Act (A-19). The IGA represents

* References to the Appendix to the Petition will be cited as "A-____). References to the Joint Appendix before the Court of Appeals will be cited as "(App. ____)."

between 4,200 and 4,600 of Philadelphia Electric Company's ("PECO") 10,000 employees, and has dealt with PECO concerning the issues of wages, hours, and working conditions for over forty years. (A-4, 19 & 20). Representatives of the IGA meet on a periodic basis with members of PECO's management to discuss these and other issues and concerns. (A-4 & 20). The IGA is open to all PECO employees.

The Black Grievance Committee (the "BGC") is a labor organization within the meaning of §2(5) of the Act. (A-16). The BGC was formed in 1968 by several black employees of PECO who felt that the IGA seemed unresponsive to allegations of discriminatory practices on the part of PECO. (A-4, 25). The BGC claims between 200 and 300 members, including PECO employees, former employees, and family members. (A-26). The record in this case does not reflect how many or what percentage of the BGC's members are current employees of PECO. The BGC is dominated by blacks, and exists primarily to eradicate perceived discriminatory practices at PECO, and to assist employees in the areas of job transfers, upward mobility for minorities and job testing. (A-4, 25).

PECO is a public utility serving approximately 3.7 million people and producing electricity, gas and steam. PECO employs approximately 10,000 individuals, and operates in Pennsylvania and Maryland. (A-19). No labor organization is, or ever has been, the exclusive bargaining representative of PECO's employees, within the meaning of §9(a) of the National Labor Relations Act. (A-20). PECO provides all of its employees with a grievance procedure which is detailed in the employee handbook. This grievance procedure consists of three steps: (1) individual employee discussion with the immediate supervisor; (2) individual employee discussion with successively higher levels of supervision; and (3) individual employee discussion with a representative of the Personnel and Industrial Relations Department, up to and in-

cluding Charles Fritz, PECO's Vice-President of Personnel and Industrial Relations. (A-4, 5). At the latter two steps, an individual may be accompanied by another employee of the company, but that employee does not act as a group representative on behalf of any labor organization. (A-5). Because these grievances are presented orally, PECO generally issues an oral response rather than a written response. (A-5).

PECO permits an alternative grievance procedure for the members of the IGA. This grievance procedure is available to all of PECO's employees to the extent that the IGA is open to all employees. After the initial discussion with the employee's immediate supervisor, an IGA member may choose to have his grievance presented in writing by an IGA representative at one of the meetings between representatives of the IGA and PECO. The grievance is investigated under the direction of Mr. Fritz, and a written answer is issued by him. In the event the grievance is denied, a meeting is held between the aggrieved employee, an IGA representative, supervisors from the employee's department and PECO's manager of Personnel and Industrial Relations. The manager mediates the meeting and recommends a disposition to Vice President Fritz. Fritz then either affirms his earlier decision, or issues a new decision. (A-5).

Although PECO meets on a monthly basis with representatives of the IGA, identifies the IGA in its employee handbook, allows the IGA to use company bulletin boards and parking lots, and has implemented a dues check-off procedure for IGA members, the IGA has never been recognized or certified under the Act. (A-4). PECO has been engaged in a non-contractual relationship of cooperation with the IGA for approximately forty years. (A-40). There are primarily two features to this relationship of cooperation. First, there is the grievance procedure accorded the IGA. Second, PECO meets with representatives of the IGA to learn the desires of IGA members prior to implementing its annual wage and benefit

package. These meetings, however, serve only as an opportunity for IGA representatives to contribute input. Following the meetings, PECO unilaterally decides what policies and benefits it will implement, and same are then made applicable to all of PECO's employees, regardless of union affiliation. (App. 31).

The BGC has never requested a dues check-off procedure, or the use of company bulletin boards and parking lots. (A-21). Although PECO has been willing to meet with the BGC to accept input on wages, hours and working conditions, the BGC has stated that it is not interested in representing its members in these areas. (A-21, 45). PECO does meet with the BGC regarding common problems and concerns, including problems in the area of race discrimination. (App. 604). PECO will, in fact, meet with the BGC about any matter of common concern, indeed any matter except an individual grievance. (A-25).

The basis of the BGC's claim is that PECO has violated §8(a)(1) of the Act by interfering with its employees', namely the BGC members', protected §7 rights. The BGC asserts that PECO accords the IGA and its members a privileged status in the presentation and resolution of individual grievances by refusing to discuss the grievances of individual BGC members with BGC representatives acting as representatives of a labor organization. In keeping with its grievance procedure, PECO does allow BGC members to accompany and assist fellow BGC members in grievance proceedings. It has been PECO's desire to have all grievances which are formally processed through group representation processed through one group. (A-5, 6). Consequently, when a BGC member accompanies and assists an employee in a grievance proceeding, PECO does not acknowledge that the employee is being assisted by the BGC *qua* labor organization, although PECO is fully cognizant that the BGC representative assisting the employee is a member of that labor organization. (A-25, App. 205). This policy of

conducting formal grievance processing through only one group is not limited to a distinction between the IGA and the BGC. Mr. Fritz has met with a group of Catholic employees, but he has told them and he has also told the Foremen's Association and Linemen's Association that he would not want them to set up a separate grievance procedure, because it would not be in the best interest of the employees to divide and segregate the company along racial or ethnic lines. (A-6, 23).

During the period 1978 through 1982, the IGA processed approximately two hundred and forty-two grievances. It processed thirty-two grievances through the final stages of its grievance procedure. (App. 36-41). There is no suggestion or evidence in the record that race, color, or sex have ever been considered by the IGA and, to the contrary, James Lange, the President of the IGA testified before the Administrative Law Judge that the race or sex of a person wishing to bring a grievance are not considered by the IGA in determining whether it will process the grievance. (App. 620). During the period 1978 through 1982, the IGA brought three grievances denominated as dealing with racial discrimination to Fritz, which is the final step in the IGA grievance procedure. (App. 33). The record is devoid of evidence as to the race of any grievant whose grievance was processed by the IGA between 1978 and 1982, and is further devoid of evidence concerning racial grievances which were denominated and processed under another category. (App. 36-41). Furthermore, there is absolutely no evidence creating even the slightest suggestion that any racial claim or grievance was ever declined or refused for processing by the IGA.

On July 21, 1980, Harold Glass, the Treasurer of the BGC, filed charges with the Regional Director of the National Labor Relations Board, alleging violations of §§8(a)(1) and (2) on the basis of PECO's meetings with the IGA and allowance of the IGA's grievance procedure, while denying the BGC its own grievance procedure.

(App. 55). The General Counsel issued a complaint alleging that the disparate treatment of the two organizations constituted an interference with protected §7 rights and was therefore a violation of §8(a)(1). (App. 57-58). Because of charges filed by an individual employee of PECO, a consolidated complaint was subsequently issued. A hearing was held before Administrative Law Judge Bruce C. Nasdor for eight days between March 8 and April 22, 1982. On November 5, 1982, Judge Nasdor issued a written decision, finding that PECO did not violate §8(a)(1) in its treatment of the BGC, and likewise did not violate §8(a)(3) in its treatment of the individual employee. Judge Nasdor recommended that the complaint be dismissed. (A-50). Exceptions were filed by the charging party, Harold Glass, and by the General Counsel to Judge Nasdor's findings with regard the §8(a)(1) violation.

On February 10, 1984, the National Labor Relations Board issued an order and decision adopting the Administrative Law Judge's decision and dismissing the complaint. (A-17). The Board concluded that PECO did not interfere with the §7 rights of its employees by not according the BGC concurrent status with the IGA in the area of processing individual grievances. (A-17). Because the Board found that there had been no interference with §7 rights, the Board found it unnecessary to address PECO's defense that it had business justifications for dealing differently with the IGA and the BGC. The BGC filed a petition to review the Board's order dismissing the complaint, and both PECO and the IGA were granted leave to intervene. Argument was heard before the United States Court of Appeals for the Third Circuit on November 29, 1984. The Court of Appeals found that the Board's factual findings were supported by substantial evidence on the record as a whole. (A-7). However, the Court then imposed its interpretation of the Act in contradiction of the interpretation of the Board. Therefore, the Court set aside the Board's order

and remanded the case to the Board for further proceedings consistent with its opinion and finding that PECO had interfered with its employees §7 rights and, therefore, had violated §8(a)(1) of the Act. Judgment was entered on January 18, 1985. The IGA now files this timely Petition for Writ of Certiorari, seeking review by this Court of the decision of the Court of Appeals on the issues raised herein.

REASONS FOR GRANTING THE PETITION

The Court of Appeals for the Third Circuit has decided questions of critical importance to all labor organizations and employers in the United States. Review by this Court is warranted because the Court of Appeals has rendered a decision which conflicts in principle and spirit with accepted interpretations of the National Labor Relations Act on an issue which had been specifically reserved by this Court in a previous decision.

In enacting the National Labor Relations Act, Congress recognized the importance of "encouraging practices fundamental to the friendly adjustment of industrial disputes" because such practices will tend "to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred. . . ." 29 U.S.C. §151. Congress has designated the National Labor Relations Board to protect the interests and promote the purposes of the Act. Review by this Court is necessary because the Court of Appeals has assumed the role of legislator in substituting its interpretation of the Act for that of the Board.

I. Whether An Employer Must Deal Equally With All Minority Labor Organizations Is An Important Question Of Federal Labor Law Which Should Be Resolved By This Court, And Which Was Specifically Reserved By This Court In A Previous Decision.

The declared purpose of the National Labor Relations Act is to protect commerce from injury, impairment, or interruption, and to promote the flow of commerce by restoring equality of bargaining power between employers and employees such that there can be friendly adjustment of disputes as to wages, hours, and working conditions. Specifically, the Act states as follows:

> It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection.

29 U.S.C. §151.

The protection afforded employees under the Act, and the obligations and responsibilities imposed on employers and labor organizations must, therefore, be viewed not merely as ends in themselves, but as a method of safe-guarding the free flow of interstate commerce.

In this case, the BGC alleged and the Court of Appeals found that PECO violated §8(a)(1) of the Act by interfering with employees' §7 rights. Both the IGA and the BGC are minority labor organizations, neither having ever been recognized by PECO, or certified under the Act. Nevertheless, the basis for the finding of a violation of the Act is that PECO has provided the IGA with its own grievance procedure. Under this procedure, IGA members who wish to present a grievance to PECO can do so through IGA representatives who are acknowledged by PECO at the grievance proceedings as representing not

only the grievant but also the IGA *qua* labor organization. PECO provides all of its employees with a grievance procedure pursuant to which the grievances are brought before the same representatives of PECO's management. While employees are entitled to have another employee accompany and assist them in grievance proceedings, PECO has denied the BGC the right to process individual grievances as a labor organization on behalf of its members. In contrast to the labor relations between PECO and the IGA, the BGC has declared a lack of interest in matters such as use of company facilities, such as bulletin boards for the exchange of information. The BGC has further declared that it is not interested in discussing wages, hours, and conditions of employment with PECO. (A-21). The BGC's narrow interest and area of activity is the single area of individual grievance proceedings. It is the denial of this limited activity to the BGC which the Court of Appeals has determined to be a violation of §8(a)(1).

In 1954, this Court decided *Radio Officers' Union v. NLRB*, 347 U.S. 17 (1954). The case involved review by this Court of three conflicting interpretations by Courts of Appeals of §8(a)(3), regarding what constitutes impermissible discrimination by an employer, in regard to hire or tenure of employment or any term or condition of employment, which encourages or discourages membership in a labor organization. One of the three cases involved the Gaynor News Company, which had a collective bargaining agreement providing, *inter alia*, for the employment of union members but allowing for the employment of non-union employees where no union employees were available. The collective bargaining agreement also provided that at such time as wages were increased, the union employees were to be given a lump sum payment representing the difference between the old and new rates, such payments to be made as three months retroactive compensation. These payments were made at the time wages were increased, and a non-union

employee of Gaynor filed unfair labor practice charges. The National Labor Relations Board held that the company engaged in disparate treatment on the basis of union membership, and therefore violated the Act.

The union at Gaynor was the exclusive bargaining agent of the employees and could not, therefore, betray the trust imposed on it by bargaining for special benefits for its members. This Court held that the disparate wage treatment of employees based solely on union membership status is " 'inherently conducive to increased union membership.' " 347 U.S. at 46. This Court went on to state as follows:

> We express no opinion as to the legality of disparate payments where the union is not exclusive bargaining agent since that is not the case before us. We do hold that in the circumstances of this case, the union being exclusive bargaining agent for both member and non-member employees, the employer could not, without violating §8(a)(3), discriminate in wages solely on the basis of such membership even though it had executed a contract with the union prescribing such action.

347 U.S. at 47.

In *Radio Officers*, this Court expressly reserved opinion as to the legality of disparate treatment where the union is not the exclusive bargaining representative of all of the employees. The instant action clearly presents an opportunity for this Court to determine the issue which was not present in *Radio Officers*, namely whether the different treatment of two minority labor organizations constitutes a *per se* violation of the Act.

Section 8(a)(5) makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)." 29 U.S.C. §158(a)(5). Section 9(a) provides that representatives selected for purposes of collective bargaining by a majority of the employees in a

unit appropriate for bargaining shall be the exclusive representatives of all of the employees in that unit. 29 U.S.C. §159(a). Section 8(a)(5) therefore obligates an employer to bargain collectively with representatives of his employees where those representatives have been selected as the exclusive bargaining representatives by a majority of the employees. The Court of Appeals determined that the Act does not impose upon the employer any obligation whatsoever to bargain with the designated representatives of a non-majority group of employees. (A-8). *See Mooresville Cotton Mills*, 2 NLRB 952 (1937), *modf'd and enf'd*, 94 F.2d 61 (4th Cir. 1938).

The Court of Appeals acknowledged that it is not unlawful under the Act for PECO to accord the IGA privileged treatment for grievance purposes. (A-8). Members-only contracts in which a labor organization, not designated as the exclusive bargaining representative, contracts with an employer for the benefit of its members only have long been recognized and accepted. *Retail Clerks International Association v. Lion Dry Goods, Inc.*, 369 U.S. 17, 29 (1962); *Consolidated Edison Company v. National Labor Relations Board*, 305 U.S. 197 (1938).

The Court of Appeals in this case found that the Act was violated by the combination of two legal, acceptable types of conduct. The Court held that although PECO had no obligation to listen to or recognize the BGC for purposes of grievance proceedings, its recognition of the IGA for this purpose rendered its denial of recognition to the BGC an interference with BGC members' §7 right of self-organization. (A-8, 9).

This Court has recognized that the task of the National Labor Relations Board in enforcing the Act is to adjust and balance the right of employees to self-organization with the rights of employers. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Beth Israel Hospital v. NLRB*, 437 U.S. 483 (1978). The §7 rights of employees are not unlimited, which fact has been rec-

ognized by the Act itself in providing that an employer is obligated to bargain collectively with the representative of its employees only when that representative has been selected by a majority of the employees. The decision of the Court of Appeals would impose upon employers an obligation which not even Congress has seen fit to impose upon employers through the Act. This unprecedented decision of the Court of Appeals would force an employer to treat every group, regardless of how small in size or limited in interest, in an identical fashion. Since the record clearly establishes the BGC's lack of interest in all matters of labor-management relations except individual grievance proceedings (A-21), the effect of the Court of Appeals' decision is to require an employer to deal equally with each group that asserts an interest, regardless of how narrow is the area of activity involved.

Requiring that an employer deal equally and identically with every group would not only create a burden on employers, but would work to the detriment of the employees as well. This Court has recognized the problems inherent in such a requirement, and has stated as follows:

> An employer confronted with bargaining demands from each of several minority groups would not necessarily, or even probably, be able to agree to remedial steps satisfactory to all at once. Competing claims on the employer's ability to accomodate each group's demands . . . could only set one group against the other even if it is not the employer's intention to divide and overcome them.

Emporium Capwell Company v. Western Addition Community Organization, 420 U.S. 50, 67 (1975). Thus, this Court has recognized that it is foreseeable that an employer faced with the decision of having to deal with all of the employee groups or deal with none may decide to deal with none. Such a decision, while perfectly legal under the Act, would hinder both employees and em-

ployers in their efforts to advance their own interests, and might result in injury and interruption to interstate commerce as a consequence of a breakdown in the consentual bargaining process.

The Court of Appeals' decision radically alters the way employers and employees must deal with one another. It will reshape the course of labor relations such that absent an organization with §9(a) status, employers might altogether refuse to deal with representatives of their employees. Review by this Court and consideration of the issue reserved by this Court in *Radio Officers* is essential to prevent detrimental changes in the ways employers and employees must approach each other.

II. The Decision Of The Court Of Appeals For The Third Circuit Conflicts In Principle And Spirit With A Decision Of The Seventh Circuit, And Is Contrary To Interpretations Of The National Labor Relations Act.

1. *The Seventh Circuit Decision*

In 1962, the Court of Appeals for the Seventh Circuit decided a case which was very similar to this case: *NLRB v. Post Publishing Company*, 311 F.2d 565 (7th Cir. 1962). In that case PCCU had, since 1921, been the lawfully recognized bargaining agent and representative of the employees. In *Post Publishing*, composing room employees had been represented by ITU under a closed shop contract. In 1921, they voluntarily left ITU and formed the PCCU, an independent labor organization. There was no claim that the employer was a motivating force in the 1921 break with ITU, or that it ever dominated PCCU or interfered with the employees' exercise of their §7 rights.

Over a period of thirty-eight years, PCCU negotiated and signed yearly contracts with the employer, and discussed and adjusted grievances. The parties "enjoyed amicable relations over the years, with no strikes or work

stoppages by the employees, and amicable adjustment of all grievances between the parties themselves without resort to outside arbitration." 311 F.2d at 566.

PCCU had been formed because of a determination by the employees that ITU dues and charges were too high. Subsequently, PCCU discontinued dues because of a surplus in its treasury. The employer then engaged in conduct which the National Labor Relations Board found to be financial support by the employer of PCCU. The employer installed a cafeteria, to be operated by PCCU members: PCCU members bought the food and fixed prices; profits were kept by PCCU and used to defray the cost of refreshments at PCCU meetings and the Christmas party. PCCU was given permission to install a coffee vending machine and was allowed to keep the employer's share of profits from the machine, which amounted to approximately $10.00 per month. PCCU realized approximately $600.00 per year from the cafeteria, thus bringing the total to $720.00 annually. ITU returned and held an organizational meeting. Two days later, at the employer's request, PCCU held a meeting at which the employer's president told the employees that they could join any union they desired and the company would bargain with it. He also told them, however, that he preferred to deal with PCCU because of thirty-eight years of amicable relations. ITU subsequently demanded recognition, which the employer denied because of its contract with PCCU. A struggle between the two unions ensued, and PCCU won. The question before the Seventh Circuit was whether the granting of $720.00 annually, in the context of the employer's "38-year history of amicable relationship with this independent union, constituted illegal financial support by respondent in violation of the Act." 311 F.2d at 568.

The Seventh Circuit denied the Board's petition for enforcement of its order against the employer. The Court concluded that the Board had erred in failing to properly distinguish between support of a labor organization and

cooperation with a labor organization. The Court stated as follows:

> The course of conduct engaged in by respondent in its relationship with PCCU follows that pattern of friendly and courteous cooperation, or even generous action, of the sort we feel brings about the end result in labor-management relations sought by the underlying philosophy motivating the National Labor Relations Act.

311 F.2d at 569.

The Court declined to find that the employer's conduct unlawfully coerced or restrained the employees in their right to freely choose or change their bargaining representative. 311 F.2d at 569. The Court went on to hold as follows:

> We hold, absent any showing of employer motivation in the original organization of the independent union or any showing of subsequent employer domination thereof, that a course of conduct over a period of years by an employer in its amicable relationship for 38 years with an independent union acting as a bargaining agent for employees (1) in permitting the union to hold meetings in its cafeteria (after working hours), (2) in permitting the union to print notices on the employer's duplicating machines, (3) and in permitting the union to retain annual profits of about $600 from the operation by the union of employer's cafeteria for employees and about $120 annually from the operation of a coffee vending machine for employees on its premises by the Union, all at the instance and request of the union and under the circumstances as herein earlier set out, is a permissible form of friendly cooperation designed to foster and resulting in uninterrupted harmonious labor-management relations, and is not the form of "support" designed to interfere with, restrain or coerce

> employees in the free exercise of their right to choose or change their bargaining representative.

311 F.2d at 569-570.

Although the Seventh Circuit's decision dealt with the legality of an employer contributing financial support to a union with which it had signed a contract, the underlying spirit and principle of fostering friendly and amicable relations between employers and labor organizations was held to be of paramount importance by the Seventh Circuit. Of course, the interest in promoting harmonious labor-management relations is not important to the exclusion of all the considerations and interests protected by the Act. The decision of the Third Circuit does, however, conflict in spirit and principle with the decision of the Seventh Circuit. Despite PECO's long history of working and dealing with the IGA, the Third Circuit would impose on PECO an obligation to deal with every other group in the same manner as it deals with an organization with which its relationship has been developing and growing for forty years. In essence, the Third Circuit would impose upon PECO an obligation to help every group achieve the strength which it has taken the IGA forty years to achieve. As the Seventh Circuit has recognized, this cannot be the intention of the Act. Assuming, arguendo, that an employer might be obligated to deal equally with minority labor organizations which have presented themselves in the workplace at approximately the same time, it is an unreasonable interpretation of the Act to hold that an employer violates the Act by according special treatment to an organization with which it has dealt for forty years. In holding otherwise, the decision of the Third Circuit conflicts in principle with the decision of the Seventh Circuit, rendering it necessary for this Court to review this case.

2. *Interpretations Of The Act*

Section 7 of the Act protects concerted activity by employees "regardless of whether their activity is channeled through a union, through collective bargaining, or through some other means." *United Packinghouse, Food and Allied Workers International Union v. NLRB*, 416 F.2d 1126, 1135 (D.C. Cir. 1969). Section 8(a)(1) protects against employer conduct which might adversely affect employees' opportunities to exercise §7 rights. *Jeanette Corp. v. NLRB*, 532 F.2d 916 (3d Cir. 1976). The Board and the Courts have decided numerous cases which delineate proscribed employer conduct. An employer may not permit some employee groups to use a hall for meetings and prevent a labor organization from using the hall; the employer also may not allow some labor organizations to use the hall, while denying others access to it. *NLRB v. Stowe Spinning Company*, 336 U.S. 226 (1949); *NLRB v. Northeastern University*, 601 F.2d 1208 (1st Cir. 1979); *Trustees of Columbia University*, 225 NLRB 185 (1976). An employer restrains and coerces employees in their attempt to exercise §7 rights, thereby violating §8(a)(1), where the employer prohibits distribution of union literature on its premises. *Montgomery Ward & Company, Inc. v. NLRB*, 692 F.2d 1115 (7th Cir. 1982); *United States Postal Service*, 269 NLRB No. 170 (April 16, 1984); *McDonnell Douglas Corp*, 210 NLRB 280 (1974). It is a violation of §8(a)(1) to threaten employees that they will have something to be worried about if they engage in union activity. Such a threat would naturally restrain employees in the exercise of their right to self-organization. *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255 (7th Cir. 1980). The Act is violated by discharging employees for union activity, *NLRB v. Metallic Building Company*, 204 F.2d 826 (5th Cir. 1953), and by discriminatorily enforcing rules against union members solely because of their union activity. *Honda of America Manufacturing, Inc.*, 260

NLRB 725 (1982). Likewise, an employer may not deny a union the right to post notices on bulletin boards while allowing other employee groups the right to use the bulletin boards. *Union Carbide Corp. v. NLRB*, 714 F.2d 657 (6th Cir. 1983); *Midwest Stock Exchange v. NLRB*, 635 F.2d 1255 (7th Cir. 1980).

The above litany of cases, and certainly there are many more, exhibit determination by the Board and the Courts to protect the right of employees to organize, to assist labor organizations, to bargain through representatives they have chosen, and to engage in other concerted activities for their mutual aid and protection. The premium placed on protecting employees in the exercise of their §7 rights has led to an expansion of the definition of concerted activity, such that "intended, contemplated or even referred to group action" is deemed concerted and therefore entitled to protection. *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 (3d Cir. 1969). The expansion in the interpretation of what constitutes concerted activity is in keeping with one of the policies of the Act, which is to insulate employees' jobs from their organizational rights, *Radio Officers' Union v. NLRB*, 347 U.S. 17, 40 (1954), by protecting "the exercise by workers of full freedom of association, self-organization, and designation of representatives . . . ." 29 U.S.C. §151; *Materials Research Corp.*, 262 NLRB 1010, 1014 (1982), quoting *American Shipbuilding Company v. NLRB*, 380 U.S. 300, 316 (1965).

This Court has upheld the Board's conviction that the "right of employees to self-organize and bargain collectively . . . necessarily encompasses the right effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 491 (1978). Decisions of the Board and Courts support this view. Clearly, the Act protects the right of employees to organize for mutual aid and protection without employer domination and interfer-

ence. The instant case, however, does not involve a situation where an employer must be restrained from engaging in certain activity in order to avoid interference with employees' §7 rights. This case does not involve any action whatsoever by PECO that interferes with §7 rights. Rather, this case involves an allegation, and a determination by the Third Circuit that by *failing to act* — by failing to treat the BGC identically to the IGA —PECO has violated the Act. The Third Circuit has departed from decisions of the Board and Courts, which have interpreted the language of the Act, by requiring that an employer such as PECO actively engage in conduct which will aid a group of employees in exercising their §7 rights. This holding certainly seems contrary to the prevention orientation of the Act, the language of which is prohibitory rather than an affirmative establishment of obligations. The Third Circuit has failed to distinguish between the right of employees to engage in concerted activity free from employer interference, which is protected by the Act, and an alleged obligation on the part of the employer to help secure the fruits of successful concerted activity for employees, which is not prescribed in the Act.

There have been situations where it has been incumbent upon an employer to deal equally with two labor organizations, and to maintain neutrality. The cases in which neutrality has been required, however, are so factually dissimilar to the instant case that they are inapposite, and must be limited to the factual situations in which they arose. Those cases held that an employer must maintain neutrality where the employees are simultaneously being organized by several labor organizations, each of which is seeking §9(a) majority representative status. *Sunbeam Corporation*, 99 NLRB 546 (1952). In another case, it was held that the employer could not grant members-only recognition to one labor organization without granting similar recognition to another labor organization. The basis of this finding, how-

ever, was that the employer had dominated and supported the favored labor organization such that it functioned as a puppet representative of the employer's interests. *Berkshire Knitting Mills*, 46 NLRB 955 (1943). In a third situation, an employer was found to have violated the Act by refusing to accord members-only recognition to one union even while it had accorded same to another union. The basis of the finding, however, was the Board's finding that the employer exhibited bad faith in dealing with the second union, and displayed hostility toward that union. *The Carborudum Company*, 36 NLRB 710 (1941). The present position of the Board is that before a valid petition for election has been filed with the Board, an employer does not violate the Act by recognizing and dealing with one labor organization rather than another. The duty of employer neutrality attaches only when a properly supported petition for election has been filed with the Board. *Bruckner Nursing Home*, 262 NLRB 955, 957-958 (1982).

This Court has recognized that it is uniquely within the province of the Board to foster the right of employees to organize for mutual aid and protection without employer interference. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 798 (1945). This includes the right to be free of employer conduct which encourages or discourages union membership or activity by means of discrimination in regard to hire or tenure or conditions of employment. 29 U.S.C. §158(a)(3); *Radio Officers' Union v. NLRB*, 347 U.S. 17, 42-43 (1954). The Board does not, however, exercise the obligation to protect employees' §7 rights in a vacuum, and has described its guiding principle as follows:

> [I]t is the Board's task to reconcile the various interests of policy and law involved in fashioning a rule which will give, as far as possible, equal consideration to each of those interests in the light of industrial reality.

Bruckner Nursing Home, 262 NLRB 955, 957 (1982). The Board, therefore, recognizes the importance of interpreting the Act in accordance with the goal of encouraging collective bargaining, but also with an awareness of the realities of labor-management relations. Such has generally been the approach of the Board and the Courts in interpreting the Act and applying it to the wide variety of factual situations which have arisen over the years.

The IGA recognizes that an employer "must give competing labor organizations equal organizational opportunties," *Boyle's Famous Corned Beef Company v. NLRB*, 400 F.2d 154, 165 (8th Cir. 1968), in order to keep within the spirit and letter of the Act. In the instant action, however, the Third Circuit has gone far beyond this. The Court of Appeals stated as follows:

> The language of section 7 itself recognizes a distinction between the rights to "self-organization," to "form, join, or assist labor organizations," to "engage in other concerted activity," and the right to "bargain collectively through representatives of their own choosing." 29 U.S.C. §157 (1982).

(A-9). The Third Circuit has taken the provision of §7 which guarantees employees the right to select their own representatives for purposes of collective bargaining, and turned it into a statutory provision guaranteeing employees the opportunity to engage in collective bargaining with their employer. This holding is an unprecedented departure from the interpretation given the Act by the Board and Courts. It conflicts with the principle and spirit of the Seventh Circuit's holding in *Post Publishing*. It also erases the distinction which has heretofore existed between an employer's obligation to allow competing labor unions the opportunity to organize (which is guaranteed by the Act), and an employer's obligation to deal with a labor organization. This latter obligation pre-

viously existed only where the labor organization had achieved §9(a) status, and was not guaranteed by the Act in the case of minority labor organizations.

III. The Court Of Appeals Has Exceeded Its Permissible Scope of Review By Substituting Its Interpretation Of The National Labor Relations Act For That Of The National Labor Relations Board, Thereby Requiring That This Court Exercise Its Power Of Supervision To Re-Establish The Respective Roles Of The Courts Of Appeals And The Board In Interpreting The Act.

Fundamental to the interrelationship and respective roles of the National Labor Relations Board and the Courts is the concept that "[t]he findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive." 29 U.S.C. §160(e). This Court has recognized the specialized judgment with which the Board is charged, and has stated as follows with regard the Board's role in labor-management relations:

> The ultimate problem is the balancing of the conflicting legitimate interests. The function of striking that balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress committed primarily to the National Labor Relations Board, subject to limited judicial review.

NLRB v. Truck Drivers Local Union No. 449, 353 U.S. 87, 96 (1957).

In the instant case, the Administrative Law Judge dismissed the complaint charging PECO with a violation of §8(a)(1), holding that "favoritism or partiality to the IGA cannot violate the rights of the BGC and its adherents where neither organization seeks Section 9(a) status." (A-4). The Board adopted the Administrative Law

Judge's findings and holding without opinion. (A-16, 17). The Court of Appeals acknowledged that "[t]he Board's factual findings must be affirmed if they are supported by substantial evidence on the record considered as a whole, 29 U.S.C. §160(e) (1982), regardless of whether we would reach a different conclusion if the matter were before us *de novo.*" (A-6); *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951). The Board found that PECO "did not, prima facie, interfere with the Sec. 7 rights of its employees by not according the Black Grievance Committee concurrent status with the Independent Group Association." (A-17). Despite the Board's holding that the facts did not support a finding of violation of §7, and therefore of §8(a)(1), and despite the Third Circuit's acknowledgment that the Board's findings were supported by substantial evidence on the record as a whole, the Court of Appeals nevertheless set aside the Board's order and substituted its own application of the Act to the particular facts for that of the Board. This is in contravention of the respective roles of the Board and Courts, thereby necessitating that this Court exercise its supervisory power to preserve the ability of the Board, and other administrative agencies, to exercise its judgment in an area in which it is charged with expertise. This Court previously recognized the expertise of the Board when it recognized the "function of the Labor Board as one of those agencies presumably equipped or informed by experience to deal with a specialized field of knowledge, whose findings within that field carry the authority of an expertness which courts do not possess and therefore must respect." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

The scope of review of the Court of Appeals in reviewing a decision by the Board is limited. *Struthers Wells Corp. v. NLRB*, 721 F.2d 465, 469 (3d Cir. 1983). This Court has stated that the "rule which the Board adopts is judicially reviewable for consistency with the Act, and for rationality, but if it satisfies those criteria, the

Board's application of the rule, if supported by substantial evidence on the record as a whole, must be enforced." *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 501 (1978); *Rikal, Inc. v. NLRB*, 721 F.2d 402 (1st Cir. 1983). In the instant case, the Court of Appeals itself acknowledged that the Board's findings were supported by substantial evidence on the record as a whole. There was no finding by the Third Circuit that the Board's conclusion was lacking in rationality or was inconsistent with the Act. To the contrary, the Third Circuit acknowledged that the Board was correct in concluding that "because the BGC has never been recognized or certified as the exclusive bargaining representative of PECO's employees, PECO had no independent obligation to listen to or recognize the BGC for purposes of its members' grievances." (A-8). Likewise, the Third Circuit held that the Board was correct in finding that it is not unlawful under the Act to accord the IGA and its members privileged treatment for grievance purposes. (A-8).

The Board, charged with specialized judgment in interpreting the letter and spirit of the Act, adopted the findings and recommended order of the Administrative Law Judge, and concluded that there was no violation of the Act. The Third Circuit, in an unprecedented departure from previous interpretations of the Act by the Board and Courts, including interpretations by this Court, substituted its interpretation of the Act for that of the Board. The Third Circuit concluded that although it is perfectly lawful for an employer to refuse to deal with a minority union or to accord privileged treatment to a particular minority union, the combination of two types of lawful conduct results in a violation of the Act. There is no support for this conclusion anywhere in the Act itself, or in the decisions of the Board or the Courts. The Third Circuit was, therefore, unjustified in substituting its own judgment for that of the Board because there was no

"proof that the decision was arbitrary or unreasonable . . ." *NLRB v. Townsend and Bottum*, 722 F.2d 297, 301 (6th Cir. 1984).

In 1980, the Third Circuit itself acknowledged the expertise and unique province of the Board and stated that "[i]f more than one inference may be drawn from a given set of facts . . . the conclusion of the Board will control unless it is unreasonable." *Hedstrom Company v. NLRB*, 629 F.2d 305, 316 (3d Cir. 1980), *cert. denied* 452 U.S. 968. It cannot be disputed that the Board was reasonable in concluding that there was no violation of the Act inasmuch as it is not unlawful to refuse to deal with a minority union, and it is perfectly lawful to accord privileged treatment to a minority union. Thus, the principle which should have governed the Third Circuit's review of this case is as follows:

> [A] reviewing court should not "displace the Board's choice between two fairly conflicting views, even though the court would . . . have made a different choice had the matter been before it *de novo*." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951).

Chamber of Commerce of the United States v. NLRB, 574 F.2d 457, 463 (9th Cir. 1978), *cert. denied* 439 U.S. 981 (1978); *International Ladies' Garment Workers Union v. NLRB*, 463 F.2d 907, 919 (D.C. Cir. 1972).

The IGA submits that this is not a situation of two fairly conflicting views, with the Board having its interpretation of the Act and the Third Circuit maintaining a different interpretation. But even assuming, arguendo, that both interpretations are reasonable, the Third Circuit exceeded its permissible scope of review by substituting its interpretation of the Act for that of the Board. This scope of review was expressed by the Third Circuit in 1983, when it stated as follows:

> In deciding whether the Board's construction of the Act . . . is permissible, we are required by the Supreme Court to accord special deference to the expertise of the Board. We may not deny enforcement merely because we would prefer another result, or even because we believe that the Act could be read to support a conclusion contrary to that adopted by the Board. Rather we are instructed to enforce orders of the Board so long as "[t]he Board's construction . . ., while it may not be required by the Act, is at least permissible under it . . . ."

E.I. Du Pont de Nemours & Company v. NLRB, 724 F.2d 1061, 1064 (3d Cir. 1983). Clearly, the conclusion of the Board in the instant case in finding that the Act had not been violated was a permissible interpretation of the Act.

The specialized judgment and expertise of the Board are to be accorded deference in the area of the Board's application of the law to the particular facts of the case. This Court has stated that where a case "presents mixed questions of law and fact" the Courts must "accord great respect to the expertise of the Board." *NLRB v. Yeshiva University*, 444 U.S. 672, 691 (1980). Assuming, arguendo, that the Board's interpretation of the Act in this case was not the only reasonable interpretation which could have been drawn, which the IGA denies, the Board's construction of the Act may not be rejected by the Courts merely because the Courts might prefer another view of the Act so long as the Board's construction is reasonably defensible. The Third Circuit exceeded its permissible scope of review by setting aside the Board's order in this case because the Board had not abused its discretion in finding that there was no unfair labor practice, and consequently no violation of the Act. *Bleier v. NLRB*, 457 F.2d 871, 872 (3d Cir. 1972).

This Court has, previously, granted certiorari to review the judgment of a Court of Appeals which contra-

vened an administrative agency's interpretation of a regulatory statute. *See Federal Open Market Committee v. Merrill*, 443 U.S. 340 (1979). Additionally, this Court has stated that it will intervene when the Court of Appeals has misapplied the appropriate standard of review of a decision of the Board. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951). Review by this Court is essential in this case in order to reclarify the role of the Courts of Appeals vis-a-vis the National Labor Relations Board.

Interpretation of a statute is often "the art of proliferating a purpose." *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 489 (1951). The express purpose of the National Labor Relations Act is to restore "equality of bargaining power between employers and employees" so as to protect the "free flow of commerce." 29 U.S.C. §151. This Court has repeatedly stated that the "width of administrative authority must be measured in part by the purposes for which it was conferred." *Federal Power Commission v. Texaco*, 417 U.S. 380, 388 (1974), quoting *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968), and citing to *Piedmont & Northern R. Company v. Commission*, 286 U.S. 299 (1932); *Phelps Dodge Corp. v. Labor Board*, 313 U.S. 177 (1941); *National Broadcasting Company v. United States*, 319 U.S. 190 (1943); *American Trucking Association v. United States*, 344 U.S. 298 (1953). The Board has been charged with the administrative authority to enforce the Act, based on its interpretation of the Act as applied to a multitude of factual situations. Thus, in this case, the Third Circuit exceeded the permissible scope of review by undermining the authority and expertise of the Board and substituting its interpretation of the Act for the interpretation of the Board, despite the fact that the Board's interpretation was reasonable and consistent with the Act.

CONCLUSION

For the reasons set forth above, the IGA's Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Opinion of the United States Court of Appeals for the Third Circuit, *Black Grievance Committee v. NLRB, et al.*, 749 F.2d 1072 (3d Cir. 1984)

BLACK GRIEVANCE COMMITTEE, Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD, Respondent,

and

Philadelphia Electric Company, Intervenor,

and

Independent Group Association, Intervenor.
No. 84-3138.

United States Court of Appeals,
Third Circuit.

Argued Nov. 29, 1984.

Decided Dec. 13, 1984.

On petition for review of final order of the National Labor Relations Board dismissing unfair labor practice complaint against employer, the Court of Appeals, James Hunter, III, Circuit Judge, held that employer's privileged treatment accorded to one nonmajority group over another nonmajority group, thereby encouraging membership in the former while discouraging it in the latter, constituted unlawful interference with employees' rights to band together in group of their choice, regardless of whether either organization sought exclusive representative status.

Order set aside; matter remanded.

1. Labor Relations [KEY] 367

Neither direct proof of interference with protected rights nor antiunion animus is necessary to sustain a violation of the National Labor Relations Act so long as employer's activity would tend to interfere with, coerce, or restrain a reasonable employee. National Labor Relations Act, §8(a)(1), 29 U.S.C.A. §158(a)(1).

2. Labor Relations [KEY] 281

Activities of nonmajority employee group in banding together to present their grievances to employer were protected by the National Labor Relations Act. National Labor Relations Act, §7, 29 U.S.C.A. § 157.

3. Labor Relations [KEY] 380

Employer's privileged treatment accorded to one nonmajority group over another nonmajority group, thereby encouraging membership in the former while discouraging it in the latter, constituted unlawful interference with employees' rights to band together in group of their choice, regardless of whether either organization sought exclusive representative status. National Labor Relations Act, §§7, 8(a)(1), 29 U.S.C.A. §§157, 158(a)(1).

4. Labor Relations [KEY] 380

If nonmajority employee group proved its allegation that determining factor in employer's decision not to accord it equal privileges to another nonmajority employee group was racial composition of former group's leadership and membership, employer would have committed an independent violation of the National Labor Relations Act for which no business justification would exist. National Labor Relations Act, §8(a)(1), 29 U.S.C.A. §158(a)(1).

Harold R. Berk (argued), Philadelphia, Pa., for petitioner.

Susan Williams (argued), Collis Suzanne Stocking, Robert E. Allen, Acting Gen. Counsel, John E. Higgins, Jr., Deputy Gen. Counsel, Elliott Moore, Deputy Associate Gen. Counsel, N.L.R.B., Washington, D.C., for respondent.

H. Thomas Felix II (argued), Karl A. Fritton, Sprecher, Felix, Visco, Hutchison & Young, Philadelphia, Pa., for intervenor, Philadelphia Elec. Co.

Robert G. Kelly, Jr., Brenda M. Flock, Kelly, Harrington, McLaughlin & Foster, Philadelphia, Pa., for intervenor, Independent Group Ass'n.

Before HUNTER and WEIS, Circuit Judges, and COHEN,* District Judge.

OPINION OF THE COURT

JAMES HUNTER, III, Circuit Judge:

This case arises on a petition for review of a final order of the National Labor Relations Board ("NLRB" or "the Board") dismissing an unfair labor practice complaint against Intervenor, Philadelphia Electric Company ("PECO"). Petitioner, Black Grievance Committee ("BGC"), is an aggrieved person within the meaning of section 10(f) of the National Labor Relations Act ("the Act"), 29 U.S.C. §160(f) (1982), and jurisdiction is based on that section. Because we conclude that the Board's decision is contrary to the language and purposes of the Act, we will set aside the Board's order and remand for further proceedings consistent with our opinion.

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* Honorable Mitchell H. Cohen, United States District Judge for the District of New Jersey, sitting by designation.

I.

The relevant background facts in this case are undisputed.[1] The Independent Group Association ("IGA") represents between 4200 and 4600 of PECO's employees, and has dealt with PECO on issues concerning wages, hours, and working conditions of its members for over 40 years. App. at 6. The IGA has not, however, ever been recognized or certified under the Act as the exclusive bargaining representative for PECO's employees. Nevertheless, IGA representatives meet monthly with PECO's personnel representatives, and the IGA is identified in PECO's employee handbook as the employee organization with which PECO discusses employee concerns. App. at 6. PECO also allows the IGA to use company bulletin boards and parking lots, and implemented a dues check-off procedure for IGA members in 1981. App. at 6-7.

The BGC was formed in 1968 by several black employees who believed that the IGA was unresponsive to alleged discriminatory practices on the part of PECO. App. at 9. Although the BGC is not limited to minority-group employees, it is dominated by blacks, and exists primarily to eradicate perceived discriminatory practices in the workplace. App. at 10. PECO representatives have met with BGC representatives concerning many issues, but have refused to discuss individual BGC members' grievances with BGC representatives. App. at 9. It is this refusal to meet over individual grievances that is at the heart of this case.

PECO provides a grievance procedure for all of its employees. This procedure is detailed in the Employee Handbook, and consists of three steps: 1) individual employee discussion with the immediate supervisor; 2) individual employee discussion with successively higher levels of supervision; and 3) individual employee discus-

1. As did the Administrative Law Judge ("ALJ") below, we will rely on the stipulation of facts agreed to by the parties. App. at 29-34.

sion with a representative of PECO's personnel department. App. at 35. At the latter two steps, an individual may be accompanied by another employee of the company, but that employee may not act as a group representative. As a general rule, PECO issues no written responses to these grievances, and employees present their grievances orally. App. at 8.

PECO also provides, however, an alternative grievance procedure for members of the IGA. App. at 35. After the initial discussion with the immediate supervisor, an IGA member may choose to have his grievance presented in writing at one of the monthly meetings between representatives of the IGA and PECO. After the grievance is discussed at this meeting, representatives of PECO's personnel department investigate the grievance, and the vice-president in charge of personnel issues a written answer. In the event the grievance is denied, another meeting is held between the employee, an IGA representative, and the employee's supervisors, and is mediated by PECO's manager of personnel and industrial relations. The manager then recommends a disposition to the vice-president of personnel, who either reaffirms his earlier decision or issues a new answer. App. at 4.

PECO's personnel policies, therefore, seemingly accord the IGA and its members a privileged status in the presentation and resolution of individual grievances. The ALJ found that the effect of this privilege is to give IGA members greater leverage in their dealings with PECO. App. at 17. The dispute in this case arose after PECO's vice-president of personnel refused to allow the BGC and its members similar privileges. Specifically, PECO refuses to meet with BGC representatives to discuss individual grievances of BGC members, and refuses to acknowledge the BGC status of employees who accompany BGC members to grievance meetings under the procedure for non-IGA members. App. at 8. Further, it is undenied that PECO's motivation for denying the BGC equal status is PECO's desire to have all grievances for-

mally processed through one group (i.e., the IGA), and its hesitance to deal with racially segregated employee organizations. App. at 32.

After a charge was filed by a BGC representative, the Board's General Counsel issued an unfair labor practice complaint, charging PECO with a violation of section 8(a)(1) of the Act, 29 U.S.C. §158(a)(1) (1982), for refusing to accord the BGC equal status to the IGA in the presentation and resolution of individual grievances. App. at 57-58. After a hearing, an Administrative Law Judge dismissed the complaint, holding "[i]n my view favoritism or partiality to the IGA cannot violate the rights of the BGC and its adherents where neither organization seeks section 9(a) status." App. at 17. A three-member panel of the Board adopted the ALJ's findings and holding without opinion. 268 N.L.R.B. No. 123 (1984). Because the ALJ's opinion, as adopted by the Board, is unsupported by the language of sections 7 and 8 of the Act, 29 U.S.C. §§157, 158 (1982), we now set aside the Board's order.

II.

We begin our analysis by noting the standard of review appropriate in this case. The Board's factual findings must be affirmed if they are supported by substantial evidence on the record considered as a whole, 29 U.S.C. §160(e) (1982), regardless of whether we would reach a different conclusion if the matter were before us *de novo*. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488, 71 S.Ct. 456, 464, 96 L.Ed. 456 (1951). The legal precepts applied by the Board to those factual findings, however, are not entitled to such deference. Instead, this court bears the ultimate responsibility to decide and enforce the applicable legal standards. *See, e.g. Graham Architectural Products Corporation v. NLRB*, 697 F.2d 534, 537 (3d Cir. 1983).

Although we might decide differently if the matter were before us *de novo,* we feel that the ALJ's factual findings concerning the privilege accorded IGA and its members because of the differences in the grievance procedures are supported by substantial evidence in the record as a whole. App. at 17 ("It is likely that [PECO's] treatment of IGA and BGC affords a certain amount of leverage to the IGA and may very well inhibit organizational activities by the BGC."). The focus of this opinion, therefore, is on the correctness of the legal standards applied to those factual findings.

[1] In this case, the relevant legal precepts are found in the statutory language itself. Section 7 of the Act states in relevant part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, ...

29 U.S.C. §157 (1982). Section 8(a)(1) of the Act states that it shall be an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the right guaranteed in section 157. . . ." 29 U.S.C. §158(a)(1) (1982). Neither direct proof of interference with protected rights nor anti-union animus is necessary to sustain a violation of section 8(a)(1), so long as the employer's activity would tend to interfere with, coerce, or restrain a reasonable employee. *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 65 S.Ct. 982, 89 L.Ed. 1372 (1945).

[2] The parties agree that the activities of the BGC members in banding together to present their grievances to PECO are protected by section 7 of the Act. *See, e.g., NLRB v. Washington Aluminum Co.,* 370 U.S. 9, 82 S.Ct. 1099, 8 L.Ed.2d 298 (1962) (non-union employees who join together to complain about lack of heat in plant

engaged in concerted activity). Indeed, the very formation of the BGC is protected by its members' rights to "self-organization" to "form, join, or assist labor organizations," and to "engage in other concerted activity. . . ." 29 U.S.C. §157 (1982).[2] Our analysis, then, is focused on whether, under the facts of this case, PECO interfered with, restrained, or coerced its employees in organizing, forming, joining, or assisting the BGC.

PECO and the Board correctly argue that because the BGC has never been recognized or certified as the exclusive bargaining representative of PECO's employees, PECO had no independent obligation to listen to or recognize the BGC for purposes of its members' grievances. *See, e.g., Morrisville Cotton Mills*, 2 N.L.R.B. 952, *modf'd and enf'd*, 94 F.2d 61 (4th Cir. 1938). They also correctly point out that the agreement with the IGA to accord its members privileged treatment for grievance purposes is not, standing by itself, unlawful under the Act. *Consolidated Edison Co. v. NLRB*, 305 U.S. 197, 59 S.Ct. 206, 83 L.Ed. 126 (1938) (holding that "members-only" agreements with non-majority unions do not violate sections 8(a)(2) or 8(a)(1) of the Act). But the Board and PECO err when they conclude that the combination of the two principles, privileged treatment of one non-majority union with a refusal to treat another equally, does not violate the Act.

The underlying premise to the decision of the ALJ and the Board is that privileged treatment of one non-majority labor organization over another does not violate the Act where neither organization seeks exclusive bargaining representative status under section 9(a) of the Act, 29 U.S.C. §159(a) (1982). App. at 19-20. The ALJ's reasoning seemed to be that because neither the IGA nor the BGC sought to be the exclusive bargaining repre-

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2. The parties do not dispute that the BGC, as well as the IGA, are "labor organizations" within the meaning of section 2(5) of the Act, 29 U.S.C. § 152(5) (1982).

sentative of PECO's employees, PECO's privileged treatment of the IGA neither assisted nor coerced employees in selecting the bargaining representative of their choice. Absent this encouragement or discouragement in the choice of bargaining representative, the ALJ concluded that PECO's activities did not interfere with any protected activities of the BGC or its members.

The fatal flaw in the ALJ's reasoning and the Board's silent adoption of its conclusion is the limitation placed on employees' rights under section 7. Although the ALJ correctly noted that encouragement or discouragement of an employees' choice of exclusive bargaining representative violates the Act, he erred in not recognizing that the protection of section 7 goes *beyond* selection of an exclusive bargaining representative, and includes the right to be free from interference with *any* organizational activity.

The language of section 7 itself recognizes a distinction between the rights to "self-organization," to "form, join, or assist labor organizations," to "engage in other concerted activity," and the right to "bargain collectively through representatives of their own choosing." 29 U.S.C. § 157 (1982). The right to band together for self-organizational purposes has consistently been recognized apart from the right to choose an exclusive bargaining representative. *See, e.g., NLRB v. Northeastern University*, 601 F.2d 1208, 1216-17 (1st Cir. 1979) (preventing one employee organization from using student center while allowing other employee organizations to do so violates section 8(a)(1)); *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 n. 6 (3d Cir. 1969) ("The joining in protests or demands, even by a small group of employees, if in furtherance of their interests as such, is a concerted activity protected by the Act. It is not necessary that union activity be involved or that collective bargaining be contemplated," quoting from Annot., 6 A.L.R.2d 416, 434 (1949)).

The importance of protecting an employee's choice to organize in one particular group as opposed to another group, even where neither group seeks exclusive bargaining status, is illustrated by the case before us. In 1968, several black employees broke off from the IGA because they believed that the IGA was unresponsive to discriminatory practices at PECO. App. at 9. Because the IGA was not and has never been recognized as the exclusive representative of PECO's employees, the black employees could not force the IGA to handle their grievances fairly or to show greater concern for the alleged discriminatory practices at PECO. *See Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 64, 95 S.Ct. 977, 985, 43 L.Ed.2d 12 (1975) ("[B]y the very nature of the *exclusive* bargaining representative's status as representative of *all* unit employees, Congress implicitly imposed upon it a duty fairly and in good faith to represent the interests of minorities within the unit."). Whether necessary or not, therefore, the BGC members perceived a need to band together to promote their common interest in having their grievances heard concerning discrimination in the workplace.

[3] As the ALJ found, PECO, by favoring the IGA in the presentation of grievances, necessarily encouraged membership in the IGA for those employees who desire a more formal, and presumably more powerful, grievance mechanism, and discouraged membership in the BGC. App. at 17 ("It is likely that [PECO's] treatment of the IGA and BGC affords a certain amount of leverage to the IGA and may very well inhibit organizational activities by the BGC."). Because the BGC was not formed "with a view towards obtaining section 9(a) [exclusive representative] status," however, the ALJ found no violation of section 8(a)(1). This reading of the rights protected by section 7, and enforced through section 8(a)(1), is too narrow, and frustrates one of the central protections of the Act — allowing employees to band together for specific grievances. Because PECO's privi-

leged treatment of the IGA encourages membership in that group and discourages membership in other groups, including the BGC, PECO has interfered with and coerced employee choice in self-organization, and in forming, joining, and assisting a labor organization.

Because of the novelty of the issue before us, we are careful to delineate the scope of our decision.[3] We are not holding that an employer violates section 8(a)(1) merely when it refuses to listen to or accord special status to the grievances of a minority labor organization, even if that refusal will affect the ability of that organization to attract members. Rather, we are holding that when an employer accords one non-majority employee group privileged status over another non-majority group, and thus encourages membership in the former while discouraging it in the latter, he unlawfully interferes with the section 7 rights of employees to band together in the group of their choice, even though neither organization seeks

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3. The Supreme Court has not considered the issue before us, and expressly reserved decision on a similar formulation of the issue in *Radio Officers' Union v. NLRB*, 347 U.S. 17, 47, 74 S.Ct. 323, 339, 98 L.Ed. 455 (1954) ("We express no opinion as to the legality of disparate payments [between union and non-union employees] where the union is not exclusive bargaining agent. . . ."). Nor does our decision in *NLRB v. Reliance Newspaper Delivery, Inc.*, 187 F.2d 547 (3d Cir. 1951) impact on our holding. In that case, an employer was charged with violating section 8(a)(3) and through it, section 8(a)(1), by paying members of a non-majority closed union, but not non-union employees, retroactive pay. This court found no violation of section 8(a)(3) because there was no evidence of discriminatory intent on the part of the employer, and because, even assuming discriminatory intent, the employer's activities could not have encouraged or discouraged the non-union employees into joining the closed union because the closed union would only allow the first male issue of each member to join. 187 F.2d at 552. The first rationale for the court's decision was subsequently discredited in *Radio Officers' Union v. NLRB*, *supra*, while the second rationale distinguishes that case from the instant one. In this case, the ALJ found that PECO's activities encouraged employees to join the IGA and discouraged membership in the BGC. App. at 18.

section 9(a) exclusive representative status. To hold otherwise would force employees, if they desire leverage against their employer, to join employee groups favored by the employer, despite the employees' belief that the favored group will not act in their best interest, and cannot be legally forced to act in their best interest. This discourages the right to self-organization, the right to form, assist, and join labor organizations, and the right to engage in concerted activity, and thus violates the Act.

III.

[4] Because we find that PECO's discriminatory treatment of the BGC constitutes a violation of section 8(a)(1), we must remand to the Board for consideration of PECO's purported business justifications, and for an appropriate remedy if no business justification exists. On remand, however, the Board should consider three last points. First, if the BGC proves its allegation that a determining factor in PECO's decision not to accord the BGC equal privileges to the IGA was the racial composition of BGC's leadership and membership, PECO will have committed an independent violation of section 8(a)(1) for which no business justification exists. *See, e.g., United Packinghouse, Food and Allied Workers International Union v. NLRB*, 416 F.2d 1126 (D.C. Cir.), *cert. denied sub nom. Farmers Cooperative Compress v. United Packing House Workers*, 396 U.S. 903, 90 S.Ct. 216, 24 L.Ed.2d 179 (1969); *Jubilee Manufacturing Co.*, 202 N.L.R.B. 272 (1973).[4] Second, any purported busi-

4. Race discrimination is not a *per se* violation of the Act. *Jubilee Manufacturing Co., supra*. Rather, there must be a nexus between the alleged discrimination and the interference with section 7 rights. Because the ALJ and the Board found that PECO did not violate the section 7 rights of BGC members, they did not consider whether a nexus existed between the alleged racial discrimination and the interference with section 7 rights. Because we have found a section 8(a)(1) violation to exist, the Board on remand should consider whether a nexus does in fact exist.

ness justification offered by PECO on remand may not relate to PECO's "preference" for the IGA as employee representative, for it is this very preference, and PECO's failure to accord the BGC and its members similar status, which establishes the prima facie violation of section 8(a)(1).[5]

Finally, we do not suggest that the only appropriate remedies for PECO's conduct are to either dismantle the IGA grievance system or to tolerate separate grievance systems for each non-majority labor organization that requests one. Rather, a grievance system which accords all employees, and not just members of a privileged group, the leverage of group representation for individual grievances will remove the unlawful coercion on employees to either join the privileged group or forego group representation for individual grievances.

The Board's order is therefore set aside, and the matter remanded for further proceedings consistent with this opinion.

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5. Indeed, the concept of business justification as an affirmative defense to a secton 8(a)(1) violation is generally limited to an employer's legitimate interests in plant safety, efficiency, or discipline. R. Gorman, *Basic Text on Labor Law* 133 (1976).

Judgment of The United States Court of Appeals for the Third Circuit (January 18, 1985)

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BLACK GRIEVANCE COMMITTEE,	)	
	)	
Petitioner,	)	
	)	
v.	)	No. 84-3138
	)	
NATIONAL LABOR RELATIONS BOARD,	)	
	)	
Respondent,	)	
	)	
and	)	
	)	
PHILADELPHIA ELECTRIC COMPANY,	)	
	)	
and	)	
	)	
INDEPENDENT GROUP ASSOCIATION,	)	
	)	
Intervenors.	)	

JUDGMENT

Before: HUNTER, WEIS, Circuit Judges, and COHEN,* District Judge -

THIS CAUSE came on to be heard upon a petition filed by Black Grievance Committee, to review an order of the National Labor Relations Board issued on February 10, 1984, dismissing the complaint against Philadelphia Electric Company. The Court heard argument of

* Honorable Mitchell H. Cohen, United States District Judge for the District of New Jersey, sitting by designation.

respective counsel on November 29, 1984, and has considered the briefs and transcript of record filed in this cause. On December 13, 1984, the Court, being fully advised in the premises handed down its opinion setting aside the Board's dismissal of the complaint and remanding the Case to the Board for further proceedings consistent with its opinion.

ORDERED AND ADJUDGED by the Court that the case be and it is hereby remanded to the Board for further proceedings consistent with its opinion.

BY THE COURT

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Circuit Judge

DATED: January 18, 1985

Decision and Order of the National Labor Relations Board, 268 NLRB 830 (1984)

Philadelphia Electric Company *and* Harold Glass *and* Edward John Kelly. Cases 4-CA-11253 and 4-CA-12547

10 February 1984

DECISION AND ORDER

BY CHAIRMAN DOTSON AND MEMBERS HUNTER AND DENNIS

On 5 November 1982 Administrative Law Judge Bruce C. Nasdor issued the attached decision.[1] The General Counsel and Charging Party Harold Glass filed exceptions and supporting briefs, and Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings, findings,[3] and conclusions[4] and to adopt the recommended Order.

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1. The judge issued an errata to his decision on 12 November and 9 December 1982.

2. Charging Party Harold Glass has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

3. No exceptions have been filed with respect to the judge's dismissal of the allegation that Respondent violated Sec. 8(a)(3) of the Act.

4. The judge inadvertently neglected to make a specific finding concerning the labor organization status of the Black Grievance Committee. We correct the judge's inadvertent omission based on the record evidence and on Respondent's concession, and conclude that the Black Grievance Committee has been, at all times material herein, a labor organization within the meaning of Sec. 2(5) of the Act.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

We agree with the judge that Respondent did not, prima facie, interfere with the Sec. 7 rights of its employees by not according the Black Grievance Committee concurrent status with the Independent Group Association. We therefore find it unnecessary to pass upon the business justifications proffered by Respondent as a defense to its position.

In concluding that Respondent did not violate Sec. 8(a)(1) of the Act as alleged, Chairman Dotson and Member Dennis find it unnecessary to rely on the judge's citation of *Bruckner Nursing Home*, 262 NLRB 955 (1982), and *RCA Del Caribe*, 262 NLRB 963 (1982).

Decision and Order of the Administrative Law Judge (November 5, 1982)

DECISION

STATEMENT OF THE CASE

BRUCE C. NASDOR, Administrative Law Judge: This case was heard at Philadelphia, Pennsylvania, on March 8-11 and April 19-22, 1982. An order consolidating cases, consolidated amended complaint, and notice of hearing issued on December 31, 1982, alleging that Philadelphia Electric Company (PECO or Respondent), since the fall of 1978 to the present, met with the Independent Group Association (IGA) to discuss wages, hours, working conditions, and grievances. It is further alleged that, during the same period of time, Respondent has refused to meet with the Black Grievance Committee[1] (BGC) to discuss these same topics, thereby engaging in disparate treatment in violation of Section 8(a)(1) of the National Labor Relations Act (the Act). The General Counsel requests as a remedy that Respondent be required to grant recognition to the BGC to the same extent that it grants recognition to the IGA.

It is also alleged that Respondent suspended and subsequently discharged Edward John Kelly because he supported and assisted the BGC and provided assistance to the Philadelphia Commission on Human Relations (PCHR), in violation of Section 8(a)(1) and (3) of the Act.

Based on the entire record, including my observation of the demeanor of the witnesses and after due consideration of the briefs,[2] I make the following

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1. In its answer and at the hearing, Respondent denied that the Black Grievance Committee was a labor organization within the meaning of the Act. In its brief it now concedes that the Black Grievance Committee is a labor organization within the meaning of Sec. 2(5) of the Act.

2. The IGA did not file a brief in this matter.

FINDINGS OF FACT

I. JURISDICTION

Respondent is, and has been at all times material herein, a public utility engaged in the generation, transmission, distribution, and sale of electricity, with a principal place of business located at 2301 Market Street, Philadelphia, Pennsylvania.

During the past year, Respondent, in the course and conduct of its business operations described above, derived gross revenues in excess of $250,000, and purchased and received goods valued in excess of $50,000 directly from points located outside the Commonwealth of Pennsylvania.

Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATIONS

IGA has been, at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

III. THE ALLEGED UNFAIR LABOR PRACTICES

PECO is a public utility with corporate offices located at 2301 Market Street, Philadelphia, Pennsylvania. It operates in the States of Pennsylvania and Maryland, serving approximately 3.7 million people, producing electricity, gas, and steam. PECO employs approximately 10,000 individuals. There are also contingent workers in the employ of a contractor, Henkels and McCoy, at PECO's Oregon shop. Tyrone Frazier, who will be discussed later, is one such individual. He considers himself to be in the employ of PECO.

A. *The Independent Group Association*

The IGA has between 4200 and 4600 members who are PECO employees. This does not include certain individuals at one location, the Chester generating station, who are represented by the International Brotherhood of

Electrical Workers. The IGA has been in existence and has been dealing with PECO on issues concerning wages, hours, and working conditions for over 40 years. In July 1969 and in April 1977, the IGA made written requests to PECO for PECO to recognize the IGA as the exclusive representative of all PECO employees for purposes of collective bargaining. In September 1969 and May 1977, PECO declined the IGA's requests. Since May 1977, the IGA has not made any requests for recognition and it has never been certified by the National Labor Relations Board as the exclusive representative of the employees of Respondent. No labor organization is, or has been, the exclusive representative of all Respondent's employees within the meaning of Section 9(a) of the Act. The IGA files reports with the U.S. Department of Labor and the Internal Revenue Service.

Respondent's personnel and industrial relations department representatives conduct monthly meetings with the IGA. Eight of these meetings are with three IGA representatives and the remaining four meetings are with IGA's entire executive committee. There is an annual luncheon every December.

At these meetings, the IGA presents its views to Respondent's management regarding wages, hours, and working conditions. As a general practice, changes in these subjects are held for the August 1 general wage and benefit improvement package, which is implemented every year. IGA and Respondent follow a procedure whereby IGA presents to management requests for items to be included in the August 1 package, and other matters involving working conditions. Respondent's representatives discuss these items with the IGA at various meetings, including two which are held for the sole purpose of discussing the August 1 package. Essentially, IGA is merely contributing input because after the meetings Respondent unilaterally implements its policies, which apply to all employees regardless of their labor organization affiliation.

From the period September 1978 to the present, 25 areas have been discussed by Respondent with the IGA.

Respondent gives IGA the right to post minutes of meetings and notices of meetings on its bulletin boards.

IGA officials are permitted to use parking lots when conducting union business. These lots are normally reserved for Respondent's management personnel.

Respondent also makes reference to the IGA in its employee handbook, "You And Your Company," as the group with which it meets to deal with matters involving wages, hours, and working conditions.

At IGA's request, beginning January 12, 1981, Respondent agreed to dues deductions for IGA members who submit written checkoff authorizations to Respondent.

BGC has never requested a dues-check-off procedure from Respondent.

Charles Fritz, Respondent's vice president of personnel and industrial relations and chief executive officer responsible for personnel matters, testified without contradiction that the BGC has never requested Respondent to meet for the purpose of discussing wages or benefits. Moreover, his unrefuted testimony is that Harold Glass,[3] a BGC representative, advised him that the BGC was not interested in working with Respondent in the area of wages and benefits.

There is no evidence that BGC has ever requested mention in the employee handbook or checkoff.

B. *Respondent's Grievance Procedure*

The testimony adduced at the hearing concentrated primarily on the disparate manner which Respondent treats the IGA and the BGC with reference to the processing of grievances. All employees process their grievances through their immediate supervisors and then through higher levels of supervision within their own de-

3. Glass, the Charging Party, has been treasurer and a member of the executive committee for 10 years.

partment. Any employee presenting a grievance may be accompanied by another employee of the Company to represent him during this phase of the grievance procedure. It is uncontradicted that Respondent has permitted members of the BGC, including Harold Glass, to regularly represent employees in the processing of grievances.

After the grievance goes through the immediate supervisor, an employee may elect to have his grievance presented to the personnel and industrial relations department in two separate ways. Employees represented by the IGA may choose to have their grievance presented in writing by IGA representatives at the periodic meetings referred to earlier. When the grievance is presented to Fritz, the employee is not necessarily present. After a written and oral presentation at the meeting, the grievance is investigated and Fritz issues a written answer. In the event that his answer is negative, there is a fourth-step appeal. A meeting is held between the employee, the IGA representative, supervisors from the employees' department, and John J. McGinley, Respondent's manager of personnel and industrial relations, who is responsible to and reports to Fritz. McGinley mediates the dispute, paying particular attention to anything which may have been overlooked at the third step. He recommends a disposition to Fritz, and Fritz then issues an answer if he has changed his initial decision. Since September 1, 1978, IGA has presented approximately 242 grievances at the third step and in excess of 30 grievances at the fourth and final step.

Employees who are not members of the IGA and employee-members who do not wish to follow the IGA procedure follow a different route after exhausting their departmental remedies. They meet directly with various representatives of the personnel and industrial relations department, including Fritz. They may be represented by another employee of their choice, and record testimony reflects that members of BGC, including Harold

Glass, have represented employees in grievance meetings with various personnel department representatives, including Fritz. As a general rule Respondent does not respond to individual grievances in writing, as the aggrieved employee is permitted to present his grievance personally to Fritz and receive an answer orally following investigation of the grievance.

There is a third variation of grievances not alluded to in PECO's handbook. When a group of employees with a common grievance do not elect to utilize the IGA, Respondent will meet with the men en masse or with representatives of the group for the purpose of resolving the grievance.

In an individual grievance when Harold Glass represents an employee, he may or may not hold himself out as a BGC representative. In either event, Respondent regards him as merely one employee representing another. It refuses to accord Glass BGC status during a grievance meeting. Furthermore, Respondent has refused to employ a process whereby the BGC can attend group meetings with the personnel department to present individual grievances in the same manner and by the same mode as the IGA. These are the practices which are alleged as violations of Section 8(a)(1) of the Act.

Fritz testified that he has told the BGC beginning in 1970 or 1971 that management did not believe it was proper to break the Company up into ethnic groups. He did not think it would be a wise thing to break the Company up into a Black group and then a group that might essentially become a white group. The employee complement would then begin to further polarize into other ethnic backgrounds. Moreover, according to his testimony, he meets on a periodic basis with a group of Catholic employees, and he would not want to see them set up a grievance procedure based on their Catholic backgrounds. He testified that creating splinter groups would be impractical both from a time and an economic standpoint.

On September 12, 1978, representatives of the personnel department and the BGC met to discuss individual grievances. Minutes of this meeting have been received in evidence as General Counsel's Exhibit 3. In that meeting Fritz again advised representatives of the BGC that PECO does not recognize it as appropriate to deal with in resolving individual grievances. He told BGC representatives that in the past he had told other groups of employees such as the foremen's association and the linemen's association that he believed it was not in the best interest of the employees to divide the Company along racial lines. Arnold Hall, a BGC representative, informed Fritz that he should meet with them as grievance representatives, but Fritz continued to maintain that he thought it was improper to split the Company along black and white lines. Again on September 26 and October 19, 1978, Fritz refused to process individual grievances at meetings with the BGC. At the meetings held on October 19, 1978, Fritz reiterated his reasons (he felt) "that it was wrong and divisive to have black employees process grievances through one group and white employees process grievances through another group, and repeated the fact that he could not formally process grievances through more than one group. He stated he was not closing the door on any future meetings with the BGC, and Mr. Hall indicated that they were not saying that they would not work through the IGA."[4] In its current posture, since September 1978, BGC representatives such as Glass are permitted to represent and participate in grievance meetings as concerned employees. When a BGC representative attends such a meeting, he or she is told that Respondent refuses to acknowledge the individual as a BGC representative or as appearing on behalf of any group or organization. Therefore, Glass has not been able to bring anyone else with him from the

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4. This quote appears in the stipulation received in evidence as Jt. Exh. 1, par. 6(d). The IGA did not join in this stipulation.

BGC to handle grievances because Respondent would be then viewing the BGC as representing the aggrieved employee. Glass is cognizant of the fact that Fritz is aware that he is a BGC representative, and therefore he does not in each and every instance request that he be considered a BGC representative. Fritz does not articulate that he is not recognizing Glass as such at each and every meeting.

It is conceded that Fritz will meet with the BGC about any matter except individual grievances.

C. *The Black Grievance Committee*

The BGC was formed in 1968 by several employees because the IGA seemed unresponsive to alleged discriminatory practices on the part of Respondent.

The BGC is composed of Respondent's employees, former employees, and their families. Harold Glass testified that its purposes are, inter alia, to assist employees in transfers and consideration of such matters as upward mobility for minorities and job testing.

Wendell Storey, BGC chairman, testified that the BGC does not file reports with the U.S. Department of Labor, Internal Revenue Service, or any other government agency. According to its constitution, which was not adopted until 1972, the BGC is governed by a main committee elected every 2 years by the general body. Voluminous record testimony reflects that the BGC does not follow this prescription. Rather, members on the main committee are selected by other members of the main committee, and the general membership has not voted on a main committee position since 1968. Moreover, the testimony is conflicting as to whether members of the main committee reelect themselves and whether this is done sporadically or with any regularity.

According to the constitution, all dues collected by the BGC "shall be utilized for legal services, operating expenses and educational benefits for minority employees of the Philadelphia Electric Company." Harold Glass,

the Charging Party, testified that in actuality the BGC's dues are used to pay lawyers.

Based on Glass' testimony, dues are collected sporadically rather than on an annual basis. Moreover, there has been no election of union officers since the BGC came into existence.

From its beginning in 1968 until 1980, the BGC was constituted of and for minority employees, and its purpose was to resolve problems of minority employees only. Glass testified that, as he understood it, minorities included all persons except white males. Specifically, minorities, according to Glass' testimony, means white females, Hispanics, male and female, and blacks, male and female.

The executive committee, which handles grievances, is an all-black committee.

In January 1980, Edward Kelly, the Charging Party in Case 4—CA-12547, became a member of the Black Grievance Committee. Thereafter, BGC's policy changed, when, in the spring of 1980, Harold Glass commenced to process Kelly's grievance. Kelly is a white male. This was the first time a grievance was processed on behalf of a white employee. Glass was unable to testify whether or not any white employees had been admitted to membership to the BGC prior to January 1980.

At the present time the BGC does not restrict admission to black members. Moreover, based on the testimony of two white males, the BGC has admitted them to membership and assisted them with problems.

Glass testified that at the present time there are between two and three hundred individuals who are members of the BGC. The record does not reflect how many of these members are current employees, former employees, or family members. Nor does the record reflect how many of the members work for other contractors.

D. *The Discharge of Edward John Kelly*

Kelly, the Charging Party, had been employed by Respondent from 1963 to October 1981, when he was terminated. For the last several years prior to this discharge, he was employed as an electrician in the bushing repair shop within the electrical maintenance division. Kelly joined the IGA in 1964 and remained a member until his discharge. In 1983, he became a shop steward at the Oregon shop and remained so until his discharge. He became disenchanted with the IGA and in January 1980 he joined the BGC.

Kelly testified that on the morning of April 10, 1978, he and a co-worker, John Hornung, engaged in a physical altercation prior to the commencement of the shift and off of company property.

According to Kelly, Hornung made an ethnic slur to him: "He offered me outside. I thought it would be just a verbal match. We went out about a block and a half from the company." Kelly's testimony and written memorandum (G.C. Exh. 6) of the incident reflect that "I found myself following him [Hornung] out of the gate and west on Oregon Avenue. . . . I looked for a safe place to lay my glasses." When Kelly turned his back, Hornung hit him on the back of the head with a piece of lumber, perhaps a two-by-four or a four-by-four. As a result of the injury, Kelly left work and did not return until August 1978. Kelly prevailed in criminal and civil actions, but if he is to be believed Hornung continued to agitate him.

On August 29 and 30 1978, Kelly embarked on a mission, a veritable crusade, to have the chronology of what will be characterized throughout this decision as "the Hornung incident"[5] placed in his personnel file. He

5. Since the incident occurred prior to the start of the shift and off of company property, neither employee was disciplined, although the incident was investigated. Both employees were interviewed and their statements placed in their personnel files.

by-passed his immediate supervisors, Crouthamel, a subforeman, and Raudenbash, the foreman, complaining to Onley, supervisor of electrical maintenance, that Hornung was harassing him by parading around carrying mock weapons. In response to this complaint, management, including Onley and his supervisor, Whitfield, general superintendent of maintenance, met with Kelly and Hornung on September 1, 1978. At this meeting, although management was not convinced that Hornung was harassing Kelly, they instructed him to avoid Kelly.

Thereafter, similar complaints by Kelly to management ensued. On September 20, 1978, Kelly complained to Onley that Hornung would walk past his work area carrying an axe. Onley investigated and found that Hornung, a carpenter, was directed by his supervisor to procure the axe. Kelly also complained about the way Hornung looked at him. Onley investigated each of Kelly's allegations regarding Hornung. He concluded that they were unfounded.

In October 1978, Kelly went to see Whitfield, complaining again about harassment, and requesting a written statement be made part of his personnel file. Whitfield refused to document the alleged friction between Kelly and Hornung. Shorly thereafter, Kelly was on disability from on or about October 18, 1978, to May 15, 1979 (approximately 30 weeks), as a result of an injury sustained in his back from falling off a chair.

In November 1978, while still on disability, Kelly met with O'Connell, president of the IGA, Downs, of Respondent's personnel department, and Dr. Hushion, director of Respondent's medical department. Kelly complained about harassment from Hornung and requested that it be documented in writing and put into his personnel file. According to Kelly, Downs responded there was nothing Respondent could do for him because it was not responsible for the fight with Hornung.

On May 23, 1979, when Kelly returned to work after his period of disability, he and his wife met with Dr.

Hushion to discuss his return to work. Hushion suggested that Kelly might be able to arrange a transfer to a different department, but added that the transfer would cost him a 10-percent cut in pay. Under these circumstances Kelly was not interested in a transfer.

During the first week of June 1979, Hornung reported to management that Kelly spit on his shoes while in the storeroom area. Kelly was called to a meeting with Onley, where he was accused of this conduct. He became very upset, and on June 5 went on disability again for anxiety and depression. Kelly did not return to work until December 19, 1979, that is, 27 weeks and 1 day.

Kelly testified that President O'Connell of the IGA arranged a meeting with Whitfield, Kelly, Hushion, and Kelly's immediate supervisors in September 1979. He testified further that the meeting was held to minimize the contact between Hornung and himself. His memorandum (G.C. Exh. 6) reflects that the purpose of the meeting was "to try to resolve the matter so life could go on." Kelly testified that on October 4, 1979, he called Joseph Gallagher, manager of the electrical production department and Whitfield's supervisor, to discuss the conditions under which Kelly could return to work without anxiety. At the meeting Kelly requested of Gallagher that Kembring, a co-worker, be allowed to work with Kelly exclusively in order to teach Kelly the job. Kelly again requested that the Hornung incident and later incidents be included in his personnel file and contended that the problems were Hornung's fault. He requested also that he be moved into the bushing shop. Gallagher agreed that he could place Kelly in the bushing shop, with the qualification that Kelly would have to work in other areas as well if maintenance management directed him to do so. Further, Respondent could not allow Kelly to work exclusively with Kembring, or agree to place a memorandum in Hornung's file. The meeting lasted approximately 2 hours and Gallagher memorialized it in a memorandum which was received into evidence as Respondent's Exhibit 10.

Gallagher testified that after this meeting he had a number of telephone conversations with Fritz about returning Kelly to work. Gallagher told Fritz he did not think Kelly was ready to come back to work and recommended that he not be returned. According to Gallagher's testimony Fritz was attempting to find a way to effect Kelly's return and make him a useful employee. Gallagher testified further that he thought Fritz was most reluctant to terminate Kelly at that time.

Whitfield testified that towards the end of 1979 it came to his attention that a poll was being run among the employees in the shop. For $1, an employee could pick a time which would be the closest to when Kelly returned to work off of sick leave benefits. An employee or employees had asked Whitfield if he wanted to "get in it for a buck." In the words of Whitfield, "[I]t was a big joke." Whitfield decided to conduct a survey[6] of Kelly's absences. He testified, "[S]o I ran a survey which indicated to me that Ed [Kelly] was taking off just about as much time as he was entitled to, and he was getting miraculously well when his benefits ran out. And, this made me feel that Ed was making a mockery of the Company benefits and taking advantage. I therefore recommended to Joe Gallagher that he not bring him back. He [Kelly] was out at the time, and I said 'don't bring him back.' " Whitfield testified further that this was not the only reason he made such a recommendation to Gallagher. Other factors were the problems Kelly was having with other people, the reports Whitfield was getting in his office about Kelly walking off the job, spending too much time on the telephone, low productivity, and all these things in combination with his absences.

Fritz testified that during the same period of time:

> Dr. Hushion called me and stated that there was a man by the name of Kelly in the maintenance division who had been off sick for some period of time,

6. Received in evidence as R. Exh. 7.

and that Dr. Hushion felt that there was a chance that this person could be turned around and be made a productive employee.

Subsequent to these recommendations, Fritz and Hushion met with Kelly and his wife in December 1979. Fritz advised Kelly of his poor absenteeism record and that Respondent could not continue for an indefinite period of time with an employee with such a poor service record. After this meeting, Fritz determined to give Kelly another chance, and did not terminate him.

On December 6, 1979, Fritz called for a meeting between Kelly and himself. Fritz, according to Kelly's own testimony, wanted to talk with him about the conditions under which Kelly felt he might be able to go back to work comfortably at the Oregon shop. At this meeting, Fritz agreed to let Kelly work exclusively in the bushing area.

Based on Kelly's testimony, shortly after his meeting with Fritz, he was authorized to return to work. Instead, he decided to take a 2-week vacation, and did not return until January 7, 1980.

In January 1980, he joined the BGC to pursue his mission to memorialize his Hornung syndrome in writing to be placed in his personnel file.

About the time Kelly returned to work in January 1980, Crouthamel began to document[7] his work habits and performance. Crouthamel testified that the documentation reflected Kelly's lateness and absenteeism record, early quits, and general work performance. According to Crouthamel's uncontradicted testimony, higher management advised him that his problems with Kelly would have to be documented to be given any credence.

On February 20, 1980, Kelly called Harold Glass and told him that he desired to document Hornung's behavior in his, Kelly's, personnel file. Glass advised him to

7. In evidence as R. Exhs. 8 and 9.

draft a chronology, which he did on February 24, 1980. On March 6, 1980, Kelly called Fritz with his request. Fritz told Kelly to make his request to Whitfield first, i.e., go through the chain of supervision. Whitfield was unavailable, so Kelly contacted Whitfield's superior, Gallagher, who again refused to place the document in Kelly's personnel file. Undaunted, Kelly called Fritz again, refusing to follow channels to Whitfield. Fritz, after some conversation, became angry, lost his temper, and hung up. Then, on the same day, Kelly called Respondent's president, J. Lee Everett. Everett told Kelly to go through Whitfield and then assured him he would be allowed to see Fritz.

Finally on March 12, 1980, Kelly met with Whitfield. He was accompanied by Glass, whom, according to his testimony, he introduced as a representative of the BGC.[8]

Whitfield testified that during the course of his meeting with Kelly and Glass it became obvious to him that Kelly was so concerned about documenting the Hornung incident in his personnel file that he, Whitfield, thought it was a situation the medical department should be involved in. Whitfield interpreted Kelly's behavior, in his words, "obsession," as not being normal and not within the sphere of his experience. Therefore, he believed he needed help from the medical department. He again refused to put Kelly's document into his personnel file and sent him to Dr. Hushion.

Prior to Kelly's appointment with Hushion, Hushion called Mrs. Kelly to discuss his problems in the Oregon shop, particularly his "obsession" which had been continuing for nearly 2 years. According to Hushion, he told Mrs. Kelly he was concerned that if her husband persisted in his demands the department might take some disciplinary action against him or Respondent might be

8. Glass and Whitfield testified that the BGC was not mentioned.

forced to put him on a medical disability, if the medical department determined that his conduct and absenteeism were due to anxiety and depression. When Kelly and Glass met with the doctor, Hushion related to them his conversation with Mrs. Kelly. After being informed that Hushion had called his wife, Kelly flew into a rage and stated, "I'm liable to go home and find my wife's head in the oven." Hushion assured Kelly that the conversation with his wife was calm and benign. He then called Mrs. Kelly back, in Kelly's presence, to explain why he had called her initially. There is a conflict in the testimony as to whether Hushion told Mrs. Kelly that her husband might be fired. Although in the final analysis I do not consider it critical, I will resolve the conflict later in my conclusions.

Subsequent to the meeting with Whitfield and Hushion, Kelly telephoned Fritz for another meeting. Kelly and Glass met with Fritz and Dr. Cincotta on March 19, 1980. During this meeting Fritz agreed to place the memorandum in Kelly's personnel file. Fritz also agreed to Kelly's request that he be allowed to work in the bushing department, apparently for the second time, although Glass does not remember this.

Kelly continued to visit Dr. Cincotta about his problems. Cincotta had been instructed by Hushion to see Kelly when he visited the medical department, which normally would be when he was out on disability. Kelly saw Cincotta twice within 10 days after the meeting in Fritz' office. During these visits on March 24 and 27, 1980, Kelly continued to complain about the "conspiracy" against him and harassment from his supervisors. Kelly was accompanied by Glass on the March 27 visit.

In July 1980 while visiting Washington, D.C., Kelly fell down the Capitol steps and injured his neck. He began treatment with Dr. Nahas, an osteopath. Nahas testified he saw Kelly about five times during this period. On August 15, 1980, Kelly visited Dr. Cincotta. Hushion testified that, when an employee is absent for any period

of time, he is required to visit the medical department periodically in order to confirm that he is legitimately disabled. Kelly was out with his neck injury from July 23 to December 15, 1980. Cincotta testified that Kelly overreacted in his responses during the examination, making it difficult for Cincotta to examine him. Cincotta testified that he felt it was inappropriate for the type of examination he was giving Kelly. Cincotta also testified that Kelly had been out approximately 4 weeks with a neck injury, and that he presented a note from his physician indicating he would be out an additional month. Cincotta stated that he suggested to Kelly he felt that was an inordinate amount of time to be off with this type of a problem. Cincotta explained to Kelly that the medical department was reviewing cases of employees who had exhibited absenteeism problems due to medical reasons. He explained that due to the so-called guidelines for employees, a closer look would be taken at his type of absenteeism record. Moreover, hopefully these employees would show some improvement when their records were reviewed. Cincotta explained further to Kelly that the medical department intended to review each case individually and that, if the employees did not show significant improvement, they might be subject to disciplinary action.

Cincotta called Nahas[9] after Kelly left his office. Cincotta's testimony and notes (in evidence as R. Exh. 12) reveal that Nahas felt that to a degree Kelly was malingering, and he needed psychiatric counseling.

Nahas testified that, although he was unable to remember much of the telphone conversation, he remembered Cincotta saying that Kelly was a troublemaker going to the Black Grievance Committee. Kelly requested Nahas to prepare a "to whom it may concern ' document

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9. Cincotta placed two calls on August 15, 1980. During one call he reached the secretary, as Nahas was out of the office.

which is dated September 29, 1980,[10] and is in evidence as Respondent's Exhibit 4. Nahas states in the document, "He [Ed] had tried to cause problems by bringing complaints to the Black Greivance Committee."

Cincotta's notes reflect that during one of the telephone calls he was advised by Nahas' secretary that Nahas suggested to Kelly that there was an emotional problem aggravating his condition and he should seek appropriate consultation.

In blaming management for his illness, Kelly testified that the fall down the Capitol steps "wasn't just a pull in the back, it was anxiety produced."

Kelly continued to see Cincotta during the fall of 1980. He had a note from his personal physician releasing him for work. Cincotta felt that, because of Kelly's medication, a combination of pain reliever and muscle relaxer which can cause drowsiness and sedation, it would not be in the best interest of safety to allow Kelly to return to work. Cincotta advised him to take another week off. Kelly testified that he accused Cincotta, "[Y]ou are not trying to run me out of sick time, are you?"

Kelly testified that during January 1981 Supervisor Crouthamel had been paying unusually close attention to his work. Crouthamel testified that on February 19, 1980, he asked Kelly how the bushing was coming, which enraged Kelly to the point where he began berating Crouthamel and heaping abusive language on him. When Crouthamel attempted to calm him down by stating, "[W]hoa Ed calm down we're adults, we can talk like adults," Kelly responded, inter alia, "Ernie Crouthamel you are going to get shoved up your ass," and, "[Y]ou are a royal pain in my fucking ass."

Later that morning Kelly was instructed to meet with Onley and Crouthamel. He brought along as his

10. Nahas testified that he prepared the document within a week or two after the call from Cincotta. In reality the document was prepared 6 weeks after the call.

representative Kembring of the IGA. Kelly refused to make any response to the allegations of the earlier incident and testified that during the meeting he became so sick that he threatened to throw up on the rug unless he was permitted to go to the medical department. Kelly was then released to go to the medical department to see Cincotta, who suggested that he see his psychiatrist, Dr. Rushton. This little episode led to a 7-month disability for anxiety, which ended when Kelly reported for duty on September 22, 1981.

It came to the attention of Whitfield that Kelly had contacted the medical department for the purpose of returning to work. On September 10, 1981, Whitfield sent a memorandum[11] to Fritz recommending that Kelly be discharged for the following reasons: "(1) a totally unacceptable attendance, (2) Kelly, when he did report to work, insisted that he be worked only in one area of the shop, limiting his flexibility and making it difficult for supervision to plan assignments. This also causes employee morale problems, as other employees feel that he is given preferential treatment by allowing him to pick his jobs, (3) Kelly's problems getting along with other employees as well as first-level supervision. Kelly repeatedly accusing other employees as well as supervision of harassment, which on investigation the accusations were found to be groundless." The document concludes with Whitfield stating that during the past 5 years Kelly had given no indication of improvement in any of the above areas and recommending that his employment be terminated.

Kelly was suspended for an indefinite duration, during which time he and his wife met with Fritz and Hushion. During this time Fritz' office reviewed Kelly's

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11. A document, in evidence as R. Exh. 19, which was approved by Joseph Gallagher, manager of the electrical production department.

case with Daltroff, the vice president of electrical production, and with the medical department. Kelly was finally terminated permanently on October 16, 1981.

E. *Kelly's Involvement with the Philadelphia Commission on Human Relations Complaints (PCHR)*

Tyrone Frazier, an employee of the independent contractor, Henkels and McCoy, filed a complaint against Respondent with the Equal Employment Opportunity Commission (EEOC) alleging that Crouthamel racially slurred him. Kelly allegedly overheard the remark. The complaint was deferred to PCHR for investigation. On September 19, 1980, Kelly spoke to a PCHR representative for the first time.

In June, Kelly was called to Whitfield's office. This meeting was for the purpose of investigating the alleged racial slur. Although there is no evidence that Kelly was the subject of any disciplinary action, or anything more than a possible witness to the remark, Kelly would not answer any questions without a representative being present.

On October 2, 1980, Kelly gave a deposition in a case the BGC had filed against Respondent. Therefore, according to the calendar, during Kelly's meetings with Whitfield, Fritz, and Hushion in March 1980, Kelly was not involved in any complaints against Respondent involving discrimination. Nor was he involved in such when he saw Cincotta in April and August 1980. After going on a 7-month disability for anxiety[12] in February 1981, Kelly filed his own charge with the PCHR charging his supervisor with harassment.

On September 24, 1981, Kelly filed another complaint with PCHR alleging discrimination by Respondent for suspending him. This complaint was filed after Whitfield's recommendation and after the machinery leading to the discharge was set in motion.

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12. The incident involving abusive language to Crouthamel.

F. *The Implementation of Respondent's Absenteeism Policy and Disciplinary Guidelines — Disabilitant Payroll*

Respondent's policies are set forth in the employee handbook "You and Your Company" and a memo entitled "Absence — Lateness Control Guidelines." Respondent's policies were supplemented in 1980.[13]

Fritz testified in essence that the guidelines allow flexibility and are applied on a case-by-case basis. Moreover, the disciplinary guidelines are not applied to individuals with long-term or chronic problems, e.g., multiple sclerosis. Absentee control guidelines are not intended to apply to long-term disability employees. Other management officials corroborated Fritz.

The record reflects by way of testimony and documentation[14] that other employees with emotional, psychiatric, and alcohol-related problems received treatment analogous to Kelly's, i.e., lengthy tolerance of absences, finally culminating in discharge.

Absenteeism had reached problem proportions, so in 1980 Respondent researched and identified those employees with long-term absenteeism records. The names of 20 employees, including Kelly, were placed on a list and given to Fritz' department with a directive to monitor those employees. Fritz made the medical department responsible for meeting periodically with each employee. Hushion instructed Cincotta to monitor their attendance and warn them that continued absences could result in their discharge. Cincotta carried out this edict and warned Kelly two or three times. After a year, a summary and recommendation were sent to Fritz. Thus, these 20 employees were in effect removed from Respondent's progressive discipline policies and placed within the sphere of the medical department.

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13. See G.C. Exhs. 25, 26, and 27.
14. See G.C. Exh. 31.

Respondent readily admits that Kelly was not warned by his immediate supervisors. Whitfield testified in answer to why he never warned Kelly in writing about his attendance:

> No Mr. Kelly's problem was extended illness, not normal one or two day outages like most attendance problems. Mr. Kelly's problem was a medical department problem. That's why Mr. Kelly did not get any reprimands or warnings through the normal disciplinary guidelines. His attendance was poor because he would take off extended periods of time, not single days which normally fall under the disciplinary guidelines.

Onley also testified that he did not warn Kelly because as far as he was concerned Kelly was absent because of medically related problems. The record does reflect that Kelly received a warning from Fritz during their meeting in December 1979 following the recommendation to terminate him by supervisors of his department.

Three out of the 20 employees were terminated for failure to report to the medical departmet as scheduled. Employees Spirito and Summeril were placed on the diabilitant payroll. Spirito met the *criteria* for the disabilitant payroll and was to be placed on it when his other benefits expired. Respondent became aware that Spirito, on the days when he was well enough, would work at his brother's business occasionally helping out with customers. Testimony by Hushion was that there was little chance that Spirito could ever return to work in Respondent's employ.

Several employees showed improvement and others were placed in a "wait and watch" category. Campbell was placed on "attendance restrictions." This required very close supervision, doctors' certificates, and ineligibility for promotions or merit increases.

Of the 12 individuals dismissed for absenteeism since March 1980, 5 were previously suspended. Others

received no warnings, some received one warning, and some received as many as three warnings. There is no real pattern.

The disabilitant payroll is payroll coverage for employees who for medical reasons are permanently disabled. Benefits are received after the expiration of the employees' sick leave time and other benefits. An employee may be placed on the disabilitant payroll if he has 15 years of service and his personal physician in conjunction with the medical department determine that the employee is permanently unable to work for Respondent. The evidence reflects that Respondent considered Kelly for the disabilitant payroll before terminating him. Fritz requested an analysis of the benefits that would be available to Kelly and asked Husion to discuss with Rushton, Kelly's psychiatrist, whether Kelly was able to work. Rushton confirmed what he had stated on the certificate when Kelly was released for work on September 23, 1982. Rushton concluded that Kelly was able to work. Accordingly, Kelly was not eligible for the disabilitant payroll in view of the fact that his own psychiatrist declared him fit for work.

G. *Conclusion and Analysis*

1. The 8(a)(1) allegation

Although the litigation was structured in terms of 8(a)(2) and (5) violations, Section 8(a)(1) of the Act is the only section alleged to have been violated.

Essentially, counsel for the General Counsel argues that the BGC should be accorded the same status and given the same advantages as the IGA.

Approximately 40 years ago, Respondent entered into a relationship, noncontractual, with the IGA. There are two features to this relationship. First, the IGA represents individual employees in presenting grievances to management. Second, before Respondent grants its annual wage and benefit package, it meets with IGA representatives to learn the desires of IGA members. Re-

spondent then unilaterally implements its terms and policies. Thus, Respondent accords "members only" recognition to IGA, a status held to be perfectly valid and lawful. See *Retail Clerks Locals 128 and 633*, 369 U.S. 17 (1962).

The fact that Respondent has voluntarily granted certain privileges to IGA, in my opinion, does not place an obligation on Respondent to grant equal privileges to the BGC. Neither the IGA nor the BGC is an exclusive representative of Respondent's employees within the meaning of Section 9(a) of the Act. Neither organization had demonstrated majority status. It is likely that Respondent's treatment of IGA and BGC affords a certain amount of leverage to the IGA and may very well inhibit organizational activities by the BGC. It must also be recognized that Respondent has not interfered with the rights of any of its employees to join or support the BGC nor has it impeded the BGC in any of its activities, organizational or otherwise.

In my view, favoritism or partiality to the IGA cannot violate the rights of the BGC and its adherents where neither organization seeks 9(a) status.

Because this case presents somewhat of a novel issue, the parties have cited telephone directories of cases in their efforts to analogize. We probably all would agree that the Supreme Court in *NLRB v. A. J. Tower Co.*, 329 U.S. 324 (1946), arrived at the conclusion that it is an unfair labor practice, a violation of Section 8(a)(5), for an employer to refuse to bargain only if the Union represents a majority of the employer's employees. The Board expresses itself clearly and succinctly in *Don Mendenhall, Inc.*, 194 NLRB 1109, 1110 (1972). In that case there was a members-only contract and the Board found that there was no violation of Section 8(a)(5). It concluded that:

> . . . the Respondent's actions cannot be held violative of Section 8(a)(5). That section, by reference to Sec-

> tion 9(a), requires as a predicate for any finding of a violation that the employee representative has been designated or selected as the exclusive representative of the employees. It has been settled since the early days of the Act that members-only recognition does not satisfy statutory norms.

While these and other cases cited, involving Section 8(a)(2) of the Act, teach basics with reference to the Board's concept of minority representatives, they do not focus on the central issue involved herein. Are employees being deprived of Section 7 rights?

It seems to me that counsel for the General Counsel is attempting to utilize Section 7 as a vehicle for demanding bargaining rights which do not exist based on Board and court law. The record is manifestly clear that Respondent grants to all of its employees the right to a representative in a grievance situation.

These rights are derived from Section 7 and 9(a) of the Act. Respondent herein has a very detailed grievance machinery which is available to all of its employees. This is not a situation like that presented in *United Aircraft Corp.*, 179 NLRB 935 (1969), where there was serious doubt of the union's continued majority status and an absence of evidence that the union enjoyed such status. In that case the employer refused to allow its employees to be represented by lodge stewards. The Board concluded: 179 NLRB at 938:

> As the Respondent's obligation to honor employee requests for union stewards was dependent upon the majority status of the Union, and as the majority status of Lodge 1746 was not established during the relevant period, we find that the Respondent did not violate Section 8(a)(5) by denying such requests.

In my opinion Respondent has not frustrated the rights of its employees, including BGC members, to en-

gage in protected concerted activity. It meets with groups of employees with common problems or grievances and interacts with their spokesman, thereby providing an access for airing either group or individual grievances. The same is equally applicable to those employees who desire to engage in union activity.

Recently, the Board reevaluated its formula for imposing strict employer neutrality[15] during the pendency of a question concerning representation (QCR). Although in the instant case there is no QCR, the case *Bruckner Nursing Home*, 262 NLRB 955 (1982), and the companion case *RCA Del Caribe*, 262 NLRB 963 (1982), probably illuminate the Board's current views in this area of the law. For my part, I ask myself, if the Board no longer requires neutrality on the facts and circumstances of those cases, how can favoritism or assistance[16] be a violation in this case? In my opinion it is not. Here, we have no incumbent union, no petition, no QCR, and no competition for exclusive representation. I do not believe that Respondent herein is responsible for organizing its employees, nor is it obligated to organize its employees whether they by IGA members, BGC members, or members of any other organization. Moreover, I conclude that, if it chooses to render aid to the IGA, it is not a violation of Section 8(a)(1) to refuse to render concomitant aid to the BGC.

The overwhelming weight of probative evidence reflects that Respondent is not discriminating against its employees. By placing the name of IGA in its handbook and setting up IGA grievance procedures, it may be minimally encouraging membership in the IGA and discouraging membership in the BGC. In my view, these factors, absent discrimination, are not violations of Section 8(a)(1) of the Act, and in no manner restrain or restrict

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15. Which has come to be known as the *Midwest Piping* doctrine, *Midwest Piping Co.*, 63 NLRB 1060 (1945).

16. Not in the context of Sec. 8(a)(2).

employees from joining, forming, or assisting a labor organization or organizations with a view towards obtaining Section 9(a) status. While Charging Party Glass may complain that he does not have the same leverage as a BGC member that he would possess as an IGA member, he has the right to engage in union or concerted activities to improve his plight and the plight of his organization, including the right to seek exclusive recognition. When all of the facts in this case are marshalled, I reach the legal conclusion that Respondent is not interfering with or abridging protected employee rights.

Respondent avers that it has legitimate business justifications for not giving the BGC the same benefits and privileges as it gives the IGA. In this regard it does not want to polarize its employees into racially segregated groups, thereby dealing with racially segregated labor organizations. It argues that it would be leaving itself vulnerable to title VII violations by fragmenting its employees into splinter groups based on race.[17]

Respondent accords status to the IGA. It advances that this is justified by the IGA's large membership, stability, and many years of existence. Conversely, it contends that the size of the BGC alone provides justification for refusing to accord it the same status. Respondent also maintains that the name of the BGC, in and of itself, gives the Respondent cause for concern that its formal recognition would lead to racial polarization.

The BGC's primary focus of consideration is the elimination of employment discrimination. Based on Fritz' uncontroverted testimony, in certain matters[18] the

17. I recognize that the BGC, at the present time, does process grievances of nonminorities.

18. For example: checkoff, parking spaces, and mention by name in the employee handbook. There was testimony by Gail Jones that a low-ranking supervisor was requested to provide bulletin board space and refused. The record is silent as to whether this supervisor had the authority to grant or refuse the space. At any rate this was not communicated to Fritz.

BGC has not even requested equal status or shown even a glimmer of interest for equal privileges. The undisputed evidence is that Respondent meets with the BGC on request, and discusses wages, hours, and working conditions. There is no evidence that Respondent has refused to meet with the BGC as a group or that it has refused to accept input from the BGC on matters involving wages, hours, or working conditions.

It is not within my province to speculate as to Respondent's wisdom, or to substitute my judgment for Respondent's judgment in arriving at its business decisions. I do conclude on the basis of this entire record and the above-cited facts that Respondent has legitimate business reasons for refusing to accord the BGC concurrent status with the IGA, and that by doing so employees are not being denied their Section 7 rights. Accordingly, I will recommend that the allegation that Respondent has violated Section 8(a)(1) of the Act be dismissed. With respect to Respondent's defense that it refuses to accord status to BGC based on its admission of supervisors to membership, I find this to be without merit. The Board has long held that supervisory membership in a labor organization is not a basis for refusing to bargain with such a labor organization. In certain industries, for example, the newspaper industry, it is common for supervisory personnel to be members of labor organizations although they are precluded by law from directing the affairs of or holding office in said labor organizations.

Addressing myself to Respondent's 10(b) defense, I find this to be without merit. Marie Wilson testified that on April 24, 1980, a petition was given to a supervisor authorizing the BGC to bring a grievance to management's attention. She testified that no response was given to the petition by Respondent. In my opinion that incident constitutes a revival of BGC's request to represent employees and a further revival of the refusal to do so by Respondent. Furthermore, there is undisputed testimony by Edward Kelly that on March 19,

1980, at a meeting with Fritz he introduced Glass as his BGC representative and Fritz responded that they could not proceed with the meeting with Harold Glass present as a BGC representative. The meeting could only continue if Glass acted as an employee representing another employee. Therefore, there is another incident where there was a request and a refusal within the 10(b) period.

2. The discharge of Edward Kelly

Throughout 8 days of the hearing, I observed Kelly on the witness stand and seated in the hearing room appearing to be taking copious notes. I am prompted at the outset to make some observations. Kelly impressed me as being so totally enveloped in paranoia, so obsessed with the impression that there was a conspiracy[19] by coworkers and management to get or harass him, that he has rendered himself wholly nonfunctional as a productive employee. Perusal of the documentary evidence and a reading of the transcript patently reveal an individual so 100 percent caught up in complusive behavior that he could not have had time to perform the requisite job duties. As a witness he had a tendency to distort and falsely color. Furthermore, he had no regard for the truth. Where there exist conflicts in the testimony, I resolve same in favor of Respondent's witnesses and against Kelly. One can only wonder why the city of Philadelphia has not been blacked out for the last 4 years.

By way of contrast, Respondent's management and medical personnel did everything humanly possible to alleviate Kelly's imagined and real discomforts, in an effort to rehabilitate him, including tolerating his excessive absenteeism for an inordinately long period of time. In my experience, I cannot recollect ever seeing an employer exhibit the degree of patience with an employee as this Respondent exhibited with Kelly.

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19. See, inter alia G.C. Exh. 6, p. 4.

The record is devoid of any direct evidence of animus. The only suggestion of animus[20] is Cincotta's alleged reference to Kelly and the BGC to Nahas on August 15, 1980, during a telephone conversation. Cincotta was exacting and unerring in his testimony. By way of contrast, Nahas was indefinite, evasive, and nebulous. When I propounded several questions to Nahas, he stated that he could not remember whether or not Cincotta used the words "troublemaker." He also admitted that he was drawing inferences rather than quoting the remark in issue. I conclude that the testimony of Nahas was unreliable and I specifically discredit him. I credit the testimony of Cincotta in every regard.

In 1978 Kelly completed his 15th year in the employ of Respondent. It was in that year that his paid sick leave benefits increased to 30 weeks. At the time of the Hornung fight he was receiving 20 weeks of paid sick leave. He stayed out as a result of that injury for 19 of the 20 weeks. From October 1978 to May 1979, he used 30 of 30 weeks when he was out because of falling from a chair. From June until December 1979 he was out for 27 weeks and 1 day out of 30 weeks because of anxiety/depression after he had been accused of spitting on Hornung's shoes. From July to December 1980, Kelly was out 19 weeks and 3 days out of 30 weeks because of a neck injury and anxiety/depression. From January until September 1981, he was out 29 weeks and 2 days out of 30 weeks because of anxiety/depression after the cursing incident. It stretches the bounds of credulity to think that this pattern was legitimate. Even Kelly's coworkers became aware of his deception when they began a pool as to when Kelly would return to work. It is no wonder that Whitfield considered Kelly's use of sick leave as a

20. Hushion's remarks to Mrs. Kelly, regardless of what version is accepted, do not rise to the level of animus. Based on Hushion's testimony and Mrs. Kelly's letter in evidence as G.C. Exh. 8, I credit Hushion and conclude that he told Mrs. Kelly that Kelly could be disciplined or placed on a medical disability.

"mockery" of Respondent's sick leave policy. His record serves as a justifiable and permissible basis for termination assuming, arguendo, legitimacy.

The record is replete with efforts on the part of management to improve Kelly's outlook and prevent his long-term absences. They coddled and indulged him. They made their medical department facilities and personnel available at his slightest whim. They warned and cajoled him, all to no avail. He received personalized, individual attention. A year before his discharge, he was placed on a list with 19 other employees with poor absenteeism records in an effort to rehabilitate him. This was but another act of futility. Respondent even involved his wife in an effort to improve his plight. They wanted to fire him in 1979, which preceded any of his protected activity, but upper management decided to work with him longer. Respondent even went so far as to try and arrange to place him on the disabilitant payroll, but his own psychiatrist found him able to work.

Although counsel for the General Counsel does not allege that Kelly was fired for IGA activities, Kelly's own perception may differ. When I asked him why he thought management had this attitude (lack of caring) towards him, he responded, "[T]owards me? Because I was very effective as an IGA representative. And at these meetings you do make enemies. Not wilfully, but you do."

Kelly's discharge occurred approximately a year after his involvement in the Frazier case, 8 months after he filed his own charge, and approximately 19 months after he went to Harold Glass and the BGC for assistance. During the period 1979 to 1981, his absenteeism, conduct, and attitude continued to deteriorate. In my opinion, Respondent does not have to live with Kelly's delicate psyche as infinitum, Respondent no doubt was always waiting for the other shoe to drop. What would some trivial incident send Kelly back to the couch and remove him from production for another 29 — but never 30 —weeks?

I find that the absentee control guidelines were not applied disparately to Kelly. The credited testimony is that they were not meant to apply to special cases of employees with chronic medical problems. In the case of *Teledyne, Inc.*, 246 NLRB 766 (1979), an employee was fired after being given a warning, while others were given written disciplinary notices or disciplined for the same reason. The employee had an obsessive insistence to be transferred to another department and made frequent complaints to all those who would listen. He made insertions in an operational logbook about his complaints and sent letters to management. His attitude towards his work was poor. Although his work evaluations were excellent they were inconsistent with his extremely poor attitude, his failure to observe work rules or safety measures, and his preoccupation with a transfer. He had a tendency to make mistakes resulting in a loss of production and possible damage to equipment. He was not as active as other employees in union and concerted activity. The record reflected that no employee had the same antagonism towards the respondent or this employee's poor attitude. The Board concluded that the employee was discharged for cause, and he was in that case referred to as a "special case." In my opinion this record amply demonstrates that Kelly was indeed a special case.

I find and conclude that Kelly's protected activity was not "a motivating factor"[21] in Respondent's decision to discharge him. There is, in my opinion, no nexus between his termination and his activities involving the BGC, the PCHR, or any other union or concerted activity he may have been involved in. The record establishes irrefutably that Respondent discharged Kelly for cause, and I so find. Accordingly, I will recommend that the 8(a)(3) allegations and the 8(a)(1) derivative allegations be dismissed.

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21. See *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The BGC is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

3. The IGA is, and has been at all times material herein, a labor organization within the meaning of Section 2(5) of the Act.

4. The allegations in the consolidated amended complaint that Respondent has engaged in conduct violative of Section 8(a)(1) and (3) of the Act have not been supported by substantial evidence.

On these findings of fact and conclusions of law and on the entire record, I issue the following

ORDER[22]

It is recommended that the consolidated amended complaint herein be, and it hereby is, dismissed in its entirety.

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22. If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recomended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

29 U.S.C. §157, (NLRA §7)

§157. Right of employees as to organization, collective bargaining, etc.

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

July 5, 1935, c. 372, §7, 49 Stat. 452; June 23, 1947, c. 120, Title I, §101, 61 Stat. 140.

29 U.S.C. §158(a), (NLRA §8(a))

§158. Unfair labor practices

(a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 156 of this title, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employ-

ment to encourage or discourage membership in any labor organization: *Provided* That nothing in this subchapter, or in any other statute of the United States, shall prelude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159(a) of this title, in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as provided in section 159(e) of this title within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further,* That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

(4) to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this subchapter;

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

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Nos. 84-1633 and 84-1641

In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILADELPHIA ELECTRIC CO., PETITIONER

v.

BLACK GRIEVANCE COMMITTEE, ET AL.

INDEPENDENT GROUP ASSOCIATION, PETITIONER

v.

BLACK GRIEVANCE COMMITTEE, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD

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1. Petitioner Philadelphia Electric Co. (PECO) employs approximately 10,000 employees. Petitioner Independent Group Association (IGA) represents between 4200 and 4600 of PECO's employees and has dealt with PECO on a noncontractual basis on behalf of its members for more than 40 years. The IGA has never voluntarily been recognized by PECO or certified by the Board as the exclusive bargaining representative of PECO's employees; however, IGA representatives meet monthly with PECO personnel

representatives to discuss wages, hours, and working conditions, and appeals of individual grievances of its members. The IGA is acknowledged in PECO's employee handbook as performing these functions. PECO has also allowed the IGA to use company bulletin boards and parking lots, and has implemented a dues checkoff procedure for IGA members. Pet. App. A19-A21.[1]

The Black Grievance Committee (BGC), which represents about 200-300 of PECO's employees, was formed in 1968 to assist minority employees on employment discrimination issues and in processing grievances. Its primary purpose still is to eliminate perceived discriminatory practices in the workplace. PECO representatives have met with BGC representatives on various matters concerning minority employees; although PECO has been willing to discuss wages and other working conditions with the BGC, the BGC has advised PECO that it is not interested in working with PECO on such matters. The BGC also has not sought the use of the company bulletin boards or parking lot, reference in the employee handbook, or dues checkoff. Pet. App. A25-A26, A44-A45. BGC objects only to PECO's refusal to meet with BGC representatives to discuss appeals of individual grievances in the same manner as under the IGA procedure, and to acknowledge the representative status of BGC officials who accompany employees to grievance meetings. Pet. App. A22-A23.[2]

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[1]"Pet. App." refers to the appendix to the petition filed by Philadelphia Electric Co., No. 84-1633.

[2]Under PECO's grievance procedure, which is available to all employees, individual employees first discuss their grievance with their immediate supervisor and, failing resolution at that step, then discuss it with successively higher levels of supervision. If the grievance is not resolved through those supervisory channels, an employee may appeal to the personnel department, and a final, nonarbitrable decision is rendered by PECO's vice president for personnel. At the appeal stage,

Based on this differing treatment of the IGA and BGC in the processing of employee grievances, a BGC representative filed an unfair labor practice charge alleging that PECO violated Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. 158(a)(1). The Board's General Counsel issued a complaint on the charge. Pet. App. A5-A6.

2. The Board, substantially adopting the findings and conclusions of the administrative law judge (ALJ), held that PECO's preferential treatment of the IGA did not violate Section 8(a)(1) of the Act, and accordingly dismissed the complaint. The Board stated that "[n]either the IGA [n]or the BGC is an exclusive representative of [PECO's] employees within the meaning of Section 9(a) of the Act [, 29 U.S.C. 159(a), and] favoritism or partiality to the IGA cannot violate the rights of the BGC and its adherents where neither organization seeks Section 9(a) status" (Pet. App. A41). The Board acknowledged, as the ALJ had concluded, that "[i]t is likely that [PECO's] treatment of IGA and BGC affords a certain amount of leverage to the IGA and may very well inhibit organizational activities by the BGC," and

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employees who are members of the IGA may elect to have the IGA process their appeal. Under this procedure, the IGA presents a written grievance at one of its periodic meetings with PECO representatives. The individual grievant is not necessarily present. Following discussion of the grievance, representatives of PECO's personnel department investigate it and the vice president issues a written answer. If the grievance is denied, the employee and his IGA representative may nonetheless choose to meet with the employee's supervisors. PECO's personnel manager mediates at this step and recommends disposition to the vice president, whose decision is final. Aggrieved employees who do not use the IGA procedures present their appeals directly to PECO personnel officials, who then conduct an investigation. PECO's vice president for personnel thereafter decides the grievance and usually presents the answer personally to the grievant. Employees who follow this non-IGA procedure are entitled to be represented or assisted by another employee of their choice, and grievants have selected BGC representatives to serve in that capacity without objection from PECO. Pet. App. A21-A23.

that "[b]y placing the name of IGA in its handbook and setting up IGA grievance procedures, [PECO] may be minimally encouraging membership in the IGA and discouraging membership in the BGC." The Board held, however, that "these factors, absent discrimination, are not violations of Section 8(a)(1) of the Act, and in no manner restrain or restrict employees from joining, forming, or assisting a labor organization or organizations with a view towards obtaining Section 9(a) status." *Id.* at A43-A44. Finding no evidence that PECO had impermissibly discriminated against any of its employees, the Board concluded that PECO "has not interfered with the rights of any of its employees to join or support the BGC" (*id.* at A41).

3. The court of appeals set aside the Board's order and remanded the case for further proceedings. The court recognized that "because the BGC has never been recognized or certified as the exclusive bargaining representative of PECO's employees, PECO has no independent obligation to listen to or recognize the BGC for purposes of its members' grievances" (Pet. App. A8). It also recognized that "the agreement with the IGA to accord its members privileged treatment for grievance purposes [wa]s not, standing by itself, unlawful under the Act" (*ibid.*). However, relying on the ALJ's finding that " '[i]t is likely that [PECO's] treatment of IGA and the BGC affords a certain amount of leverage to the IGA and may very well inhibit organizational activities by the BGG,' " the court concluded, contrary to the Board, that "PECO's privileged treatment of the IGA encourages membership in that group and discourages membership in other groups, including BGC" and that therefore "PECO has interfered with and coerced employee choice in self-organization and in forming, joining, or assisting a labor organization" (*id.* at A10).

Because it found that PECO's discriminatory treatment of the BGC constitutes a prima facie violation of Section 8(a)(1), the court remanded the case to the Board "for consideration of PECO's purported business justifications, and for an appropriate remedy if no business justification exists" (Pet. App. A12).[3] The court added that it was not suggesting that "the only appropriate remedies for PECO's conduct [would be] to either dismantle the IGA grievance system or to tolerate separate grievance systems for each non-majority labor organization that requests one. Rather, a grievance system which accords all employees, and not just members of a privileged group, the leverage of group representation for individual grievances will remove the unlawful coercion on employees to either join the privileged group or forego group representation for individual grievances." *Id.* at A12-A13.

4. Petitioners contend that this case raises the issue whether an employer must treat all minority unions equally (84-1641 Pet. i, 8-9) and more particularly, whether an employer may recognize one minority union for the purpose of processing grievances without according similar privileges to all other minority unions (84-1633 Pet. i, 12). However, the court of appeals did not hold that any preference accorded by an employer to one non-majority union over another violates Section 8(a)(1), or that an employer must always treat two or more non-majority unions equally in all respects. Rather, the court was careful to explain that it was deciding only whether, "under the facts of this case, PECO interfered with, restrained, or coerced its employees in organizing, forming, joining, or assisting the BGC" (Pet. App. A8). Although the court found, contrary to the Board, that PECO's preferential treatment of the IGA in respect to

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[3]The Board had previously found it unnecessary to pass on the business justifications proffered by PECO (Pet. App. A15 n.4).

grievance processing was a significant benefit which, absent a substantial business justification, would constitute impermissible interference with the employees' exercise of their Section 7 rights, this disagreement between the court and the Board raises essentially a fact-bound issue. This Court ordinarily does not review such issues. See *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490-491 (1951). Moreover, the court of appeals did not finally determine whether PECO's preferential treatment of IGA violated Section 8(a)(1) of the Act, but remanded the case for the Board to evaluate, in the first instance, PECO's business justifications. The court also indicated that, even if the Board ultimately rejected PECO's business justifications, it was not required to provide remedies that would require PECO either to "dismantle the IGA grievance system or to tolerate separate grievance systems for each non-majority labor organization that requests one" (Pet. App. A12-A13).

In light of the fact-specific nature of the court of appeals' decision and the interlocutory posture of the case, the Board decided not to file a petition in this case.[4]

Respectfully submitted.

REX E. LEE
Solicitor General

ROSEMARY M. COLLYER
General Counsel
National Labor Relations Board

MAY 1985

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[4]Contrary to the contention of petitioner IGA (84-1641 Pet. 14-17), the decision below does not conflict with the decision in *NLRB* v. *Post Publishing Co.*, 311 F.2d 565 (7th Cir. 1962). There, the court held that an employer's contribution of profits from cafeteria and beverage vending machine sales to a union with which it had a contract did not constitute unlawful assistance and financial support of a labor organization under Section 8(a)(2) of the Act, 29 U.S.C. 158(a)(2). Nothing in that decision bears on the question whether the privileges granted to members of one non-majority group over members of another in their relationship with their employer impinges on the Section 7 rights of employees to be free of employer pressure in organizational activities.

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v.

BLACK GRIEVANCE COMMITTEE, NATIONAL LABOR RELATIONS BOARD, and INDEPENDENT GROUP ASSOCIATION,

Respondents.

AND

INDEPENDENT GROUP ASSOCIATION,
Petitioner,

v.

BLACK GRIEVANCE COMMITTEE, NATIONAL LABOR RELATIONS BOARD, and PHILADELPHIA ELECTRIC COMPANY,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF BLACK GRIEVANCE COMMITTEE TO PETITIONS FOR WRIT OF CERTIORARI

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BRIEF IN OPPOSITION OF BLACK GRIEVANCE COMMITTEE TO PETITIONS FOR WRIT OF CERTIORARI

COUNTER-STATEMENT OF THE CASE

Respondent Black Grievance Committee ("BGC") accepts most of the statement of the case presented by petitioners Philadelphia Electric Company ("PECO") and Independent Group Association ("IGA") with the exception of the argument supporting the petitions contained within their respective statements of the case. BGC, however, does wish to add a few points to clarify the record.

The BGC was formed seventeen years ago due to the perception by black employees at PECO that the IGA was not responsive to black employees' claims of racial discrimination and other problems affecting black workers (A25).* Since the IGA was not an exclusive bargaining representative, its members desiring to assert claims of racial discrimination could not force the IGA to handle their grievances or obtain greater attention to alleged discriminatory practices in the event that the IGA was reluctant to proceed (A9-10). The BGC thus arose to direct attention to alleged racially discriminatory practices which BGC members wished to have addressed within the grievance system established by PECO for the benefit of all its employees.

PECO did permit the BGC to represent its members in individual grievance proceedings for a period of ten years until September 12, 1978 when PECO reversed its earlier position and prohibited BGC from representing its membership in grievance proceedings concerning any issue (A23-24). Thus, for a period of ten years PECO permitted BGC members to have their freely

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* In citing to the documents in the Appendix, BGC will cite the Appendix submitted by PECO while noting that both Appendices contain the same documents though with different pagination.

chosen labor organization, BGC, represent their interests in individual grievance proceedings before it abruptly changed its position. Thereafter, employees, not members of IGA, or who chose not to be represented by IGA in grievance proceedings, could be represented by a single co-employee serving in a representative capacity merely as an interested friend and not as the representative of any group or labor organization.

PECO thus forced employees to choose between labor organization representation by IGA or individual employee representation without the assistance of any labor organization (A11).

After permitting BGC to represent its members for ten years, PECO justified its abrupt refusal to permit further BGC representation claiming that to do so would permit racial polarization of the work force where black and white groups would represent the interests of their respective members (A5, 23, 24). Though this rationale appears neutral on its face, since the IGA had an all white executive board and the sole right to represent employees as a labor organization, black employees desiring to assert claims which the IGA did not support were deprived of labor organization assistance by the favoritism given IGA and the ban on representation by BGC. BGC therefore argued that PECO committed an unfair labor practice violating Section 8(a)(1) of the National Labor Relations Act by refusing BGC permission to represent its members on the grounds of the race of the leadership and membership of BGC which had a nexus to interference with Section 7 rights. This claim founded on racial discrimination was asserted in addition to the claim under Section 8(a)(1) of interference with Section 7 rights through disparate treatment and favoritism and support for the IGA.

On the unique facts presented by this case, the Court of Appeals held that when an employer creates a grievance mechanism

and then accords one non-majority employee group privileged status over another non-majority group, encouraging membership in the former while discouraging it in the latter, it unlawfully interferes with the Section 7 rights of employees to band together for mutual assistance in the group of their free choice (A11). The court noted that otherwise employees would be forced, if they desired group leverage against their employer, to join employee groups favored by the employer despite the employees' belief that the favored group will not be supportive of their interests and cannot be legally forced to fairly represent their interests. *Id.*

PECO and IGA have filed petitions for a writ of certiorari from this decision, but the NLRB has chosen not to seek review of the Court of Appeals decision.

ARGUMENT

I.

The unique factual circumstances of this case resulted in a decision, for which the NLRB does not seek review, that is consistent with prior decisions of the Supreme Court.

Petitioners invite this Court to exercise its discretion to determine this case on the merits though myriad reasons exist for the Court to decline the invitation. First, the unique factual circumstances of this case suggest that the fact pattern is *sui generis*. Second, the NLRB has not chosen to seek review though it was the respondent below. Third, the NLRB did not give full consideration to the case prior to review by the Court of Appeals and issued a decision adopting the opinion of an Administrative Law Judge without independent analysis by the Board. Fourth, the decision of the Court of Appeals is consistent with the purposes of the NLRA and previous decisions of this Court. Fifth, petitioner PECO observes that the Third Circuit is "the first court of appeals

to confront the issue directly" (Petition for Certiorari at 12). Sixth, there are no decisions by the NLRB or other courts of appeals which are inconsistent on the precise issue presented concerning the respective rights of members of non-majority labor organizations in a grievance system created by the employer.

The uniqueness of this case lies in the fact that PECO permits a forty year old non-majority labor organization to represent its membership in an employer-created grievance system while not permitting a seventeen year old non-majority labor organization to represent its membership though it previously permitted the younger group the opportunity to represent its members for a period of ten years. The uncommon posture in which the issues are presented makes this case an undesirable vehicle for this Court to determine principles of labor law which have not been discussed by other circuits and which did not receive a full measure of discussion by the NLRB which would assist review by this Court.

The application by the Court of Appeals of Section 7 and Section 8(a)(1) of the NLRA to the unique facts of the case is consistent with prior decisions of this Court and is not inconsistent with the decisions of other circuits. Section 7 guarantees "the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activity for . . . mutual aid or protection. . . ." 29 U.S.C. §157. Section 8(a)(1) of the Act enforces the rights guaranteed by Section 7 by declaring it an unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the right guaranteed in Section 157. . . ." 29 U.S.C. §158(a)(1). Though BGC does not have Section 9(a) status as the exclusive bargaining representative, the actions of BGC members in banding together to present their grievances to PECO constitute concerted action protected by Section 7 of the Act. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

Since BGC has never been recognized or certified as the exclusive bargaining representative, PECO has no independent obligation to permit BGC to represent members in grievance proceedings. *Morrisville Cotton Mills,* 2 NLRB 952, *modified and enforced,* 94 F.2d 61 (4th Cir. 1938). The members only agreement with IGA permitting representation in grievance proceedings is not, standing by itself, an unfair labor practice. *Consolidated Edison Co. v. NLRB,* 305 U.S. 197 (1938). However, when PECO grants members only recognition to IGA for grievance administration but denies and refuses to permit corresponding rights to BGC on behalf of its membership, PECO has engaged in disparate treatment tending to promote membership in IGA and inhibit membership in BGC. *Berkshire Knitting Mills,* 46 NLRB 955, *modified and enforced,* 139 F.2d 134 (3rd Cir. 1943), *cert. denied,* 322 U.S. 747 (1944); *Sunbeam Corporation,* 99 NLRB 546 (1952); *Carborundum Company,* 36 NLRB 710 (1941). Disparate treatment inhibiting Section 7 rights constitutes an unfair labor practice under Section 8(a)(1). *NLRB v. Stowe Spinning Co.,* 336 U.S. 226 (1949); *NLRB v. Northeastern University,* 601 F.2d 1208 (1st Cir. 1979); *Trustees of Columbia University,* 225 NLRB 185 (1976).

Disparate treatment in the use of company bulletin boards may constitute unlawful interference. *Midwest Stock Exchange Inc. v. NLRB,* 635 F.2d 1255 (7th Cir. 1980); *Union Carbide Corp. v. NLRB,* 714 F.2d 657 (6th Cir. 1983). Restrictions on solicitation of employees for union purposes when other solicitation is permitted under similar circumstances may violate Section 8(a)(1). *Montgomery Ward and Co., Inc. v. NLRB,* 692 F.2d 1115 (7th Cir. 1982); *Midwest Stock Exchanger Inc. v. NLRB, supra.* Hospital rules preventing employee solicitation for union membership during non-working time in non-working areas constitutes interference with the right of self-organization protected by Section 7. *Beth Israel Hospital v. NLRB,* 437 U.S. 483 (1978). Company rules prohibiting employee wearing of union insignia

in the absence of special circumstances constitutes unlawful interference with Section 7 rights. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945); *Larand Leisurelies, Inc. v. NLRB*, 523 F.2d 814 (6th Cir. 1975).

The import of these disparate treatment cases is that an employer unlawfully interferes with Section 7 rights when it refuses to permit organizational and other activities of members of a labor organization when it permits other organizations or groups to conduct similar activities. Thus, petitioners are correct that, standing alone, an act utilizing economic weapons which may encourage or discourage union membership is not an unfair labor practice. *NLRB v. Brown*, 380 U.S. 278 (1965); *American Shipbuilding Co. v. NLRB*, 380 U.S. 300 (1965). But here the discouragement of BGC membership comes in a factual circumstance where the employer has voluntarily established a grievance system and permitted one non-majority labor organization the exclusive right to represent its members in the grievance system while denying the right of representation to another non-majority labor organization. It is thus the disparate treatment of employees engaging in protected concerted activities together with the resulting encouragement and discouragement of membership in the two labor organizations which lies at the heart of this case. Coupled with this disparate treatment is the coercion and interference with employees' right to free choice of their labor organization through the employer's grant of the exclusive right to represent members in grievance proceedings to the favored IGA. This coercion of selection of labor organizations for employees desiring group representation in the grievance system, exists while the employee has no right to compel the non-majority IGA to fairly represent the employee's interests. *Emporium Capwell Co. v. Western Addition Community Organization,* 420 U.S. 50, 64 (1975); *Vaca v. Sipes,* 386 U.S. 171 (1967).

Petitioners have misstated the clearly limited holding of this case dependent upon its unique facts by claiming that the Court of Appeals decided that employers must deal equally and identically with every non-majority labor organization. The limited holding of the Court of Appeals depends upon the employer's creation of a grievance system where employees cannot claim a legal duty of fair representation and where the employer grants an exclusive right to represent members to only one non-certified labor organization.

Due to the unique factual circumstance of this case, the decision of the Court of Appeals will not impact upon the experimentation with alternative forms of employee organizing and representation as suggested by petitioners. In any event, if petitioners are correct that many new forms of labor organizations and modes of employee representation are coming into existence, the adjustment of the respective rights of employees in the variety of labor organizations contemplated should not be determined by this Court prior to any review by the NLRB of these new forms of employee representation and where no other court of appeals has considered the myriad issues created by a host of yet undefined alternative modes of self-organization and employee representation.

Further, since the NLRB chose neither to file a Petition for Writ of Certiorari nor to issue its own decision on this case, but rather, chose to adopt the decision of an Administrative Law Judge, it is clear that this case does not present the type of case in which this Court should attempt to determine the rights of employees without an exclusive bargaining representative where they have formed together to seek mutual aid and protection of their interests through concerted action under Section 7 but where the employer engages in differential treatment of the budding labor organizations.

In the posture of this case, this Court should decline the invitation to finally determine principles of federal labor law without prior full consideration by the NLRB and the various courts of appeals.

II.

The Court of Appeals applied the well established principle that NLRB legal conclusions are not entitled to the usual deference when they rely upon an erroneous legal foundation.

Both petitioners seek review of the Court of Appeals decision claiming that it applied an impermissible standard of review of NLRB legal conclusions. Though petitioners cite a number of cases applying different formulations of the standard of review applicable in different circumstances, the Court of Appeals in the instant case applied a very traditional and well established principle by not according the legal conclusions of the NLRB their usual deference since they were inconsistent with the Act and rested upon an erroneous legal foundation. *NLRB v. Yeshiva University*, 444 U.S. 672, 691 (1980); *Ford Motor Co. v. NLRB,* 441 U.S. 488, 497 (1979); *NLRB v. Brown*, 380 U.S. 278, 292 (1965); *NLRB v. Babcock and Wilcox Co.*, 351 U.S. 105 (1956).

Though the initial language by the Court of Appeals in applying the appropriate legal standards may suggest that the court was adopting a broader scope of review (A6), analysis of the entire decision of the court demonstrates that it merely applied the traditional erroneous legal foundation standard in reversing a decision of the NLRB. The Board silently adopted the legal analysis of the Administrative Law Judge who interpreted the effect of Section 7 and Section 8(a)(1) of the Act in a manner inconsistent with decisions of the courts and the Board itself. Specifically, the Administrative Law Judge held that Section 7 rights were limited to situations involving a restraint upon "employees from

joining, forming, or assisting a labor organization or organizations with a view towards obtaining Section 9(a) status" (A44). The Court of Appeals held that the Administrative Law Judge "erred in not recognizing that the protection of Section 7 goes *beyond* selection of an exclusive bargaining representative, and includes the right to be free from interference with *any* organizational activity" (A9). The court held that reading of the rights protected by Section 7 and enforced through Section 8(a)(1) was too narrow and frustrated fundamental principles of the Act permitting employees to band together to address specific grievances even when they do not seek Section 9(a) exclusive bargaining status (A10).

The court therefore held that the NLRB decision was premised upon an erroneous legal foundation not supported by decisions of the Board or the courts. When an NLRB decision is premised upon an erroneous legal foundation, the cases previously cited require withdrawal of the usual deference accorded the Board's interpretation of the NLRA due to the inconsistency of its position with the Act.

Since the standard of review applied by the court follows this traditional standard of review, there is no reason for this Court to review the application of this well established principle.

CONCLUSION

For the above and foregoing reasons, the Court should deny the petitions for writ of certiorari filed in both of these cases.

Respectfully submitted,

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